

7-17-09 Hearing

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF PENNSYLVANIA  
3 HILDA L. SOLIS, )  
4 Plaintiff, ) 2:09-CV-00988-CDJ  
5 vs. ) Philadelphia, PA  
6 JOHN J. KORESKO, V, et al. ) July 17, 2009  
7 Defendant. )

8 TRANSCRIPT OF ERISA HEARING  
9 BEFORE THE HONORABLE C. DARNELL JONES, II  
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 For the Government: LINDA M. HENRY, ESQ.  
13 JOAN M. ROLLER, ESQ.  
14 JOANNE BILETTA JARQUIN, ESQ.  
15 U.S. DEPARTMENT OF LABOR, REGION

III,

16 OFFICE OF THE SOLICITOR  
17 170 S. Independence Mall West  
18 Suite 630 East  
19 Philadelphia, PA 19106

20 For the Defendant: JOHN J. KORESKO, ESQ.  
21 KORESKO LAW FIRM  
22 200 West 4th Street  
23 Bridgeport, PA 19405  
24 TIMOTHY J. NIEMAN, ESQ.  
25 STEPHEN MONIAK, ESQ.  
RHOADS & SINON  
One South Market Square  
12th Floor  
Harrisburg, PA 17108

ESR Operator: NELSON MALAVE

Proceedings recorded by electronic sound recording.

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I N D E X

3 WITNESSES: Direct Cross Redirect Recross

4 For the Government:

5 Robin Murray 12 31

6 Drake Nicholas 66 81

7 Jocelyn Sweeting 98

8

9 EXHIBITS: Marked Admitted

10 For the Government:

G-3 E-mail from PennMont to Robin Murray 19

11 G-4 E-mail from Robin Murray to Gene Bonnie at PennMont 20

12 G-15 E-mail from Gene Bonnie to Robin Murray 21

13 G-5 E-mail from Gene Bonnie to Robin Murray 22

14 G-7 E-mail from PennMont to Robin Murray 25

15 G-8 E-mail from Robin Murray to Larry Townsend 26

16 G-9 E-mail from Larry Townsend to Robin Murray 28

17 G-16 E-mail from Gene Bonnie to Robin Murray 30

18 G-17 Letter from Koresko Law Firm to Mr. Nicholas, Rhoades & Sinon 67

19

20

21 RULINGS: Page Line

22 Motion to quash subpoena to Ms. Russell granted 9 19

23 Request for a temporary restraining order denied 121 7

24

25

7-17-09 Hearing  
presiding. 1 THE CLERK: The Honorable C. Darnell Jones  
2 THE COURT: Good morning. You may be seated.  
3 IN UNISON: Good morning, Your Honor.  
4 THE COURT: Counsel, would you identify yourselves  
5 for the record?  
Secretary 6 MS. HENRY: For the plaintiff, Hilda Solis,  
7 of Labor, Linda Henry, United States Department of Labor,  
8 Regional Solicitor's Office. Also with me at counsel table  
9 are Joan Roller --  
10 MS. ROLLER: Good morning, Your Honor.  
11 MS. HENRY: -- and Joanne Jarquin.  
12 MS. JARQUIN: Good morning.  
13 THE COURT: Good morning.  
14 MR. KORESKO: For the defendants, John Koresko.  
15 THE COURT: Good morning.  
16 MR. KORESKO: Good morning, sir.  
Community 17 MR. NIEMAN: Your Honor, for the defendant,  
18 Trust Company -- excuse me, for Farmers & Merchants Trust  
19 Company is successor to Community Trust Company. Tim Nieman  
20 with Steve Moniak for Rhoads & Sinon, and I'll get the words  
21 out better as we go forward today.  
22 THE COURT: Very well, good morning.  
23 MR. MONIAK: Good morning.  
24 THE COURT: Counsel, let's do this. Why don't you  
25 remain standing? Let's go forward with the motion to quash

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Colloquy

1 that you filed. And I said remain standing; I'm talking to  
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2 counsel, here. Thank you very much for your courtesy.

3 MR. NIEMAN: Yes, Your Honor, thank you. Yesterday  
4 we filed a motion to quash in response to a subpoena that was  
5 served, and I use that term in quotes, upon Susan Russell who  
6 is an employee of F&M Trust. The subpoena was served at  
7 approximately some point after 12:30 yesterday afternoon,  
8 which was less than twenty-four hours. It was not personally  
9 served on Ms. Russell. Instead, there was another bank  
10 employee who doesn't even work at that office who happened to  
11 be there, and it was handed to him, and that was the service.  
12 There was no witness fee tendered, there was no mileage fee  
13 tendered, there was no advance notice of the subpoena, as  
14 well, even though it asks for the production of documents at  
15 the hearing here today.

16 So our first grounds for quashing the subpoena would  
17 be that service wasn't effectuated properly and there isn't a  
18 proper subpoena in the first place. Second of all, if you  
19 take a look at the subpoena itself, in light of the time  
20 constraints we had, less than twenty-four hours, and with the  
21 broad nature of the documents requested, there was just no  
22 that we could have complied. First of all, under Rule 45,  
23 there has to be a reasonable time to comply. If there isn't  
24 reasonable time to comply, the subpoena should be quashed.  
25 Here, the subpoena requested the witness, Ms. Russell, to

way

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## Colloquy

1 bring with her all correspondence between any of the  
2 following: Susan Russell, Lowell Gates, F&M Trust,  
Department  
3 of Labor, and Rhoades & Sinon. That encompasses thousands  
and  
4 thousands of pages of documents because it's not limited in  
5 any time of -- any way or manner of time, scope, relevancy,  
6 even, or subject matter. It could be, conceivably, almost  
7 every piece of paper that's within the possession of F&M  
Trust  
8 and its predecessor, CTC. So there wasn't reasonable time to  
9 comply.

10 In addition to this, because the subpoena asks for  
11 documents that relate to communications with Rhoads & Sinon  
there's  
12 and also with Mr. Gates who was former counsel of CTC,  
13 issues of privilege that would need to be reviewed and looked  
14 at, as well, which we were not able to do because of the time  
15 constraints and because there was no limit on the subject  
16 matter, there were plenty of documents that are responsive to  
17 this subpoena that deal with non-REAL VEBA, clients of F&M  
be  
18 Trust and its predecessor, CTC, and those would conceivably  
19 subject to issues of confidentiality and also issues of  
20 business information and protected business information.

21 And finally, Rule 45(c)(1) imposes a duty upon the  
22 defendants who served the subpoena, which is Mr. Koresko's  
23 clients, to take reasonable steps to avoid imposing undue  
24 burden or expense. And it's our contention that by serving  
25 this, sort of at the eleventh hour, with this unwieldy, broad

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Colloquy

1 request for documents, and not even effectuating proper  
2 service in the fact that we had to go to the expense and  
3 trouble to file and prepare this motion in brief, that we  
4 should be entitled to attorneys' fees and costs for that, as  
5 well, Your Honor.

6 THE COURT: Thank you very much.

7 MR. NIEMAN: You're welcome.

8 THE COURT: Mr. Koresko?

9 MR. KORESKO: Let me -- Your Honor, we filed this  
10 morning a motion to dismiss on the 12(b)(1) and 12(b)(6), and  
11 unfortunately, I got the -- as we talk about eleventh hour  
12 issues, I got their motion to quash last night at  
13 approximately 7 o'clock, 7:30 at my office while I was  
14 on the 12(b)(1) and 12(b)(6). So I think we all are under an  
15 eleventh hour in this. The Department of Labor filed this,  
16 I got notice Tuesday evening for this preliminary injunction  
17 and TRO. The Department of Labor, yesterday, which was very  
18 interesting, filed an amendment in which they changed a lot  
19 things. First of all, they said that their statements to the  
20 Court were on representations from counsel of F&M and that  
21 they were going to produce and F&M employee to testify  
22 ostensibly against our interest. which means that the  
23 was going to testify against the interests of the

working

or

of

trustee

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24 beneficiaries acting through their irrevocable attorney, in  
25 fact. To come to court and say we will gladly produce

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Colloquy

DOL

1 somebody, but we won't gladly produce the person that can  
2 actually show that there was collusion between F&M and the  
3 that would obviate the complaint in its entirety on the basis  
4 of unclean hands, and possibly expose why F&M Trust Company  
5 should not even be a fiduciary anymore because of its lack of  
6 good faith and its lack of fiduciary responsibility to its  
7 sesquae (ph.), and, by the way, its litigation partner in  
8 numerous litigations.

9 THE COURT: Let me just ask you at this juncture to  
10 address the violations of Rule 45.

office

11 MR. KORESKO: Okay, the issue regarding service,  
12 Susan Russell is an employee. Susan Russell is what is the  
13 principal person on this account. It was served at the  
14 of the individual employee. There hasn't been any testimony  
15 here that the person was not a person in charge --

16 THE COURT: Doesn't the rule -- and I apologize for  
17 interrupting, but as I understand the rule, the rule requires  
18 delivering a copy to the named person.

--

19 MR. KORESKO: Delivering a copy to the -- there's  
20 actually three -- there is three provisions. The Federal  
21 Rules provide not only for serving -- I believe it's Rule 4

22 provide for service under the law of the state and also under  
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23 the Federal Rules itself. In this particular instance, we  
24 took the position that serving a person at the office of F&M  
25 was tantamount to service on Ms. Russell, particularly - -

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Colloquy

regarding 1 THE COURT: But you also took that position  
2 Lowell Gates, is that correct?  
3 MR. KORESKO: Lowell Gates' deposition -- it's not  
it's 4 just involved in the deposition of Lowell Gates, although  
5 very important for her to confirm what Mr. Gates said. We  
6 didn't serve Mr. Gates properly, and that's a problem. There  
7 was a mistake made by the processor on the subpoena to Lowell  
8 Gates. Consequently, we don't have the people here that are  
9 necessary to prove our case. But at the same time, Your  
10 Honor, it's completely inequitable for F&M to claim a  
11 violation of Rule 45 as to a favorable witness, but then to  
12 offer an unfavorable witness without any objection at all.  
13 It's completely contradictory to their obligations under the  
14 plan and trust documents. It goes to the nature of the  
15 proceeding. The reason for this TRO is to allegedly impose a  
16 mandatory injunction on us. To reverse our exercise in  
17 discretion. It is complete inequitable --  
18 THE COURT: Counsel, I don't want to get into the  
19 substance of your argument. I just want to hear, right now,  
20 the procedural violations.  
21 MR. KORESKO: It was served at the office of the



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22 individual on a person who allegedly was the person in charge  
23 at the time. There's been no offer of proof contradictory to  
24 that. We don't believe that a -- because of the -- also,  
25 because of the privity between the trustee and the  
defendants,

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Colloquy

1 here, in essence, and also because Ms. Russell, through  
2 Community Trust Company, is in essence, an employee, an agent  
3 of the defendants in this case. They're parties. It's not  
4 just a situation where it's a third-party witness.

5 THE COURT: All right.

6 MR. KORESKO: These are parties.

7 THE COURT: Thank you very much. Counsel, you wish  
8 to respond?

9 MR. NIEMAN: Your Honor, Rule 45 is very clear in  
10 terms of how service is to be made. If Mr. Koresko had  
11 attempted to serve a corporate designee of F&M Trust, it  
might  
12 be a different story. He specifically attempted to serve  
13 Ms. Russell. He had to have his process service personally  
14 hand the document to her, tender the witness check and the  
15 mileage check. That was not done here, and the motion should  
16 be quashed on that reason alone -- or, I'm sorry, the  
subpoena  
17 should be quashed on that reason alone.

18 THE COURT: The order of the Court is as follows.  
19 And now, this 17th day of July, 2009, upon consideration of

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defendant 20 the within the emergency motion to quash subpoena of  
successor 21 Farmers and Merchants Trust Company of Chambersburg,  
22 by merger to Community Trust Company, it is hereby ordered  
23 that said subpoena directed to Susan Russell if quashed. The  
24 basis for this order is the defendant Koresko's violation of  
25 Federal Civil Procedure 45.

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Colloquy

1 Now, let's go to the TRO -- excuse me. Counsel, let  
2 me just address one other issue, and that is the request for  
3 attorneys' fees.  
4 MR. NIEMAN: Yes, Your Honor.  
5 THE COURT: I'll hold that under advisement --  
6 MR. NIEMAN: Okay.  
7 THE COURT: -- at this point.  
8 MR. NIEMAN: Thank you.  
9 THE COURT: Yes, sir. All right. Counsel, you may  
10 proceed.  
11 MS. HENRY: Thank you. Your Honor, we intend to  
12 proceed to show why temporary restraining order should be  
13 issued against what we call the Koresko defendants in this  
14 case. Before we proceed with our witnesses, procedural  
15 matter, I know that many papers have been brought to the  
16 Court's attention. There has, also -- and we would be  
willing 17 to give a courtesy copy to the Court if you do not have it  
18 yet -- a complaint that had been filed yesterday evening by  
19 some of the Koresko defendants against Hilda Solis, several

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would  
20 attorneys with the U.S. Department of Labor, and several  
21 investigators with the Department of Labor. And we just  
22 thought that if the Court didn't have a copy of that, we  
23 be willing to supply it.

24 THE COURT: We have it.

25 MS. HENRY: Thank you. The Secretary calls Robin

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Colloquy

Court  
cannot  
1 Murray.  
2 MR. KORESKO: Your Honor, we would like to  
3 preliminarily object to this proceeding. If the Court does  
4 not have subject matter jurisdiction of this matter, the  
5 cannot issue a temporary restraining order, and a Court  
6 issue the relief that they have requested because the  
7 Department of Labor doesn't have standing to even come in and  
8 ask.

9 THE COURT: The objection's overruled. You have an  
10 exception.

11 MR. KORESKO: Is Your Honor -- are you making a  
12 ruling at this point that the Department of Labor has  
13 standing?

14 THE COURT: counsel, the objection is overruled.

15 MR. KORESKO: Okay.

16 THE COURT: You have an exception.

17 MR. KORESKO: Thank you.

18 THE COURT: You may step forward.

19 MR. KORESKO: Your Honor, I object to this

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particular

under

20 being called. This particular witness, first of all, is  
21 a fiduciary relationship to the defendants. This particular  
22 witness has absolutely no knowledge and information about the  
23 course of conduct relating to this particular matter. This  
24 particular witness was hand-picked, apparently, by an  
25 interested trust company in order to overrule the plain

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Colloquy

1 language of the documents best in complete discretion in the  
2 choice of the fiduciary in PennMont Benefit Services, Inc.  
3 Consequently, what she has to offer is predominantly hearsay  
4 testimony and also the fact that she has no history with the  
5 particular relationship that's credible under these  
6 circumstances.

7 THE COURT: All right, again, the objection's  
8 overruled. The Court will hear her testimony and rule based  
9 upon what she says.

10 PLAINTIFF'S WITNESS, ROBIN MURRAY, SWORN

record,

11 THE CLERK: Please say your full name for the  
12 spelling your last name.

13 THE WITNESS: Robin Murray, M-U-R-R-A-Y.

14 MS. HENRY: Your Honor, for this proceeding, would  
15 you prefer that counsel stand at table to examine or come to  
16 the podium?

17 THE COURT: Whatever's convenient for you, counsel.

18 MS. HENRY: Thank you.

19 DIRECT EXAMINATION

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20 BY MS. HENRY:

21 Q. Please state your name and business address.

22 A. Robin L. Murray, 20 South Main Street, Chambersburg, PA.

23 Q. And for whom do you work?

24 A. Farmers & Merchants Trust Company.

25 Q. What is your job title with Farmers & Merchants Trust

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Robin Murray - Direct

1 Company?

2 A. Trust operations manager.

3 Q. What are the duties of the trust operations manager?

4 A. I oversee the trust operations clerks, and we verify and  
5 post the information that our admin assistants input. We  
6 process checks and trades, the tax processing in the  
7 department.

8 THE COURT: I'm sorry, what was the last portion of  
9 the sentence?

10 THE WITNESS: Tax -- we process tax information in  
11 our department.

12 Q. Is F&M Trust the trustee of a trust known as the Single  
13 Employer Welfare Benefit Plan Trust and/or the REAL VEBA  
14 Trust?

15 A. Yes.

16 Q. And at what point in time did F&M become the trustee of  
17 that trust?

18 A. Upon the merger with CTC, November 30, 2008.

19 Q. At that time, did you obtain any trust agreements

between

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20 CTC and the plan administrator?

21 A. Yes.

22 Q. Did you review those agreements?

23 A. Yes.

24 Q. Who was the plan -- is the plan administrator?

25 A. That is Sue Russell.

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Robin Murray - Direct

1 Q. Okay, that's what you're calling an administrator within

2 your --

3 A. Yes, yes.

4 Q. Okay, when I talk about a plan administrator, are the  
5 plans -- do they have an administrator who requests payment  
6 from the trust for their services or for benefits or for  
7 premiums?

8 A. I'm sorry, can you --

9 Q. Yes, I'll try to phrase it another way.

10 A. Okay.

11 Q. Are you familiar with a company called PennMont --

12 A. Yes.

13 Q. -- Benefit Services?

14 A. Yes, yes.

15 Q. Who is PennMont Benefit Services?

16 A. They are the ones that do direct us. They give us the  
17 information every week what to -- they would be the  
18 administrator, that's what you're looking for. Yes.

19 Q. Did the trust agreement say that CTC and, by merger, F&M

20 Trust was a directed trustee?

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21 MR. KORESKO: Objection, Your Honor.

22 THE COURT: Basis?

23 MR. KORESKO: The trust documents speak for  
24 themselves. They've been attached to the motion for  
25 preliminary injunction and temporary restraining order. In

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Robin Murray - Direct

as 1 addition, this particular individual has not been qualified  
2 able to make legal determinations as to the implications of a  
competent 3 particular trust agreement. Consequently, she's not  
4 to testify as to what it says or what the import is.

5 THE COURT: Overruled. Do you recall the question?

6 THE WITNESS: No.

7 A. Can you repeat please?

and 8 Q. Yes. Did the trust agreement say whether or not CTC,  
9 thus F&M Trust, was a directed trustee?

10 A. Yes.

11 Q. And what did it say?

12 A. It says that we are the directed trustee.

13 Q. What do you understand about F&M's trust duties as a  
14 directed trustee?

15 A. We receive direction from PennMont, and as a directed  
16 trustee, we also, we have a few fiduciary responsibility on  
17 the account to review what they request to make sure that the  
18 requests are acceptable distributions.

19 MR. KORESKO: Your Honor.

20 THE COURT: Yes?  
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21 MR. KORESKO: With all due respect, that's a legal  
22 conclusion. The term fiduciary responsibility is a legal  
23 conclusion, it's not a fact.

24 THE COURT: The objection's overruled.

25 BY MS. HENRY:

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Robin Murray - Direct

1 Q. Did you, in the normal course of your duties, receive e-  
2 mails from PennMont for payments?

3 A. Yes.

4 Q. I'm going to show you an exhibit that is an e-mail dated  
5 May 5, 2009, and I have a query for the Court.

6 MS. HENRY: These have already been numbered as  
7 exhibits in an attachment to an affidavit that was submitted  
8 with the department's application. We could keep the same  
9 numbering system --

10 THE COURT: Let's do that, please.

11 Q. I will show you, then, what has been marked as Exhibit  
3.

12 MS. HENRY: May I approach the witness?

13 THE COURT: Yes. Yes, please, thank you.

14 Q. Do you recognize the document that has been marked as  
15 Exhibit 3?

16 A. Yes.

17 Q. What is this document?

18 A. It's an e-mail that I received from Gene Bonnie.

19 Q. And what was the subject matter of this e-mail from Gene  
20 Bonnie?



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21 THE COURT: Excuse me, for the record --  
22 A. Oh, from --  
23 THE COURT: -- who is Gene Bonnie? I'm sorry.  
24 THE WITNESS: I'm sorry.  
25 THE COURT: For the record, who is Gene Bonnie?

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Robin Murray - Direct

1 THE WITNESS: She works for PennMont.  
2 THE COURT: Do you know what capacity?  
3 THE WITNESS: She's an attorney.  
4 THE COURT: You may continue.  
5 BY MS. HENRY:  
6 Q. In the course of your duties with F&M trust, when you  
7 received e-mails from PennMont requesting payments, from whom  
8 do those e-mails typically come?  
9 A. They either come from Larry or Gene, and actually, this  
10 one was from Larry. I'm sorry, I said Gene.  
11 Q. who is Larry?  
12 A. Larry Townsend also works for PennMont.  
13 Q. Did you respond -- well, let me ask this another way.  
14 Did you forward all the payments requested in this e-mail  
15 marked as Exhibit 3? And by you, I mean F&M Trust?  
16 A. No, we did not.  
17 Q. which payments did you not forward?  
18 A. The legal fees to Koresko Law Firm.  
19 Q. And why didn't you forward those fees?  
20 A. Because due to -- whenever we spoke to our counsel, and  
21 through the decision, we made a decision that we would not

pay

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22 this because we did not feel it was an allowable expense for  
23 the plan.

the

24 Q. And why wasn't it felt to be an allowable expense for  
25 plan?

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Robin Murray - Direct

1 A. well, let me back up. We actually sent another e-mail  
2 requesting additional information, so we sent an e-mail prior  
3 to making that decision.

4 MS. HENRY: I would move for the admission of  
5 Government Exhibit 3 into evidence.

6 THE COURT: Any objection?

7 MR. KORESKO: Your Honor, our objection would  
8 primarily be on the basis of privilege in that this is a  
9 communication between employees of Koresko law firm and the  
10 trustee. And in addition, Your Honor, I would ask you to  
11 take --

12 THE COURT: Excuse me, did you disagree with the  
13 witness that this was transmitted from your entity to her?  
14 And if that's the case, the privilege is waived.

15 MR. KORESKO: Well, Your Honor, I would ask you to  
16 take a look at the bottom of the e-mail, it says F&M 362.  
17 This was production of documents that was made part -- we  
18 believe that this was made part of a production of documents  
19 voluntarily given to the Department of Labor by F&M Trust  
20 Company. I believe that the present --

21 THE COURT: But counsel, you're mixing apples and  
22 oranges.

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23 MR. KORESKO: Well, no, it goes to the issue of  
24 whether there's a statutory privilege under the Gramm-Leach-  
25 Bliley Act, the detail was previously asserted on behalf of

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Robin Murray - Direct

v.

1 the defendants in the context of the litigation Child (ph.)  
2 Community Trust.

3 THE COURT: If that's the basis for the objection --

4 MR. KORESKO: Yes, Your Honor.

5 THE COURT: -- the objection is overruled. The  
6 exhibit is admitted. Excuse me, thank you.

7 BY MS. HENRY:

8 Q. You mentioned that you had communications with PennMont  
9 after receiving the e-mail marked as Exhibit 3. I would like  
10 to show you what has been previously marked as Exhibit 4 in  
11 the documents attached to the application.

12 MS. HENRY: May I approach?

13 THE COURT: Yes.

14 Q. Do you recognize the document marked as Exhibit 4?

15 A. Yes.

16 Q. What is this document?

17 A. It's an e-mail that I sent to Gene Bonnie.

that

18 Q. And the date of this e-mail is Monday, May 11th. Is  
19 when you sent it to Gene Bonnie?

20 A. Yes.

21 Q. Why did you send this e-mail to Gene Bonnie?

22 A. We sent this to request additional information regarding

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our  
in  
23 the legal services fee that was requested for us to pay for  
24 85,000 dollars to Koresko. We wanted some further -- it's  
25 policy in our department to have those types of information

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Robin Murray - Direct

1 our department and due to the policy, we wanted to have the  
2 invoice to support their request.

3 MS. HENRY: I would move for the admission of  
4 Government Exhibit 4.

5 THE COURT: Any objection?

6 MR. KORESKO: No, Your Honor.

7 THE COURT: So admitted.

8 MS. HENRY: I have an exhibit that was not attached  
9 to the application for a TRO which we will call Government  
10 Exhibit 15 because there were fourteen exhibits.

11 THE COURT: Very well.

12 MS. HENRY: And may I approach?

13 THE COURT: Does Mr. Koresko have a copy of that?

14 MS. HENRY: I'm going to give Mr. Koresko --

15 THE COURT: All right. Certainly.

16 MS. HENRY: -- and Mr. Nieman a copy.

17 BY MS. HENRY:

18 Q. Looking at Government Exhibit 15, do you recognize this  
19 document?

20 A. Yes.

21 Q. What is this document?

22 A. It's an e-mail that I received from Gene Bonnie.

23 Q. And what was the e-mail from Gene Bonnie in regards to?

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24 A. It was her response to my request, and she sent an  
25 attachment including the invoice that represented the 85,000

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Robin Murray - Direct

1 dollars.

2 Q. When you say a response to your request, was this a  
3 response to your request for --

4 A. In the e-mail from Exhibit 4.

5 Q. -- from PennMont --

6 A. Yes.

7 Q. -- for the 85,000, is that correct?

8 A. Yes.

9 Q. Did you have any communications with Ms. Bonnie orally,  
10 or over the phone?

11 A. No.

12 Q. After you received Government Exhibit 15 from Ms. Bonnie  
13 from PennMont, did you forward the money in response to the  
14 request for the 85,000 dollars?

15 A. No, we did not.

16 Q. Why not?

17 A. After reviewing the spreadsheet, we saw that the  
expenses  
18 were tax issues, and we did not feel that they were allowable  
19 payable expenses.

20 MS. HENRY: I would move for the admission of  
21 Government Exhibit 15.

22 THE COURT: Any objection?

23 MR. KORESKO: None, Your Honor.

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24 THE COURT: So admitted. You may continue.

25 MS. HENRY: May I approach?

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Robin Murray - Direct

1 THE COURT: Yes.

2 BY MS. HENRY:

3 Q. I will show you what has been marked as Government  
4 Exhibit 5. Government Exhibit 5 is a document that has, at  
5 the top, Robin Murray, forward, FW checks 2009.05.12.419.

Did

6 you receive this e-mail?

7 A. Yes.

was

8 Q. And did you receive this e-mail on the date that this  
9 sent?

10 A. Yes.

11 Q. And what was this e-mail in reference to?

12 A. This was our weekly request to process checks that we  
13 receive from Gene Bonnie's office.

14 Q. And when you say our weekly, do you refer to F&M Trust?

15 A. yes, yes, sorry.

16 Q. And is that, when you say the weekly request, is that a  
17 weekly request from PennMont for distribution of monies from  
18 the trust?

19 A. Yes.

20 Q. Did you review this e-mail?

21 A. Yes.

22 Q. Did you forward the monies that were requested, all of  
23 the monies that were requested in this e-mail?

24 A. No, we did not.

25 Q. And why not? <sup>7-17-09 Hearing</sup>

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Robin Murray - Direct

1 A. We felt that -- she did include an attachment, but we  
2 felt that it was the same situation as previous, that this  
was  
3 including a tax issue, and it was not allowable expenses.

4 Q. And when you say a tax issue that wasn't allowable  
5 expenses, what do you mean by that?

6 A. Well, we just feel that that is not an allowable expense  
7 for this plan. That -- I don't know how to word it.

8 MS. HENRY: I would move for the admission of  
9 Government Exhibit 5.

10 THE COURT: Any objection?

11 MR. KORESKO: Only subject to the Gramm-Leach-Bliley  
12 objection, Your Honor.

13 THE COURT: Very well, objection's overruled,  
14 exception's noted. The item is admitted.

15 MS. HENRY: May I approach?

16 THE COURT: Yes.

17 BY MS. HENRY:

18 Q. I'm showing you what has been marked as Exhibit 7, an e-  
19 mail with Robin Murray wires 2009.05.26.419 at the top. Do  
20 you recognize this document?

21 A. Yes.

22 Q. What is this document?

23 A. Again, it's the weekly request to process checks and  
24 wires for the week.

25 Q. To process checks and wires from the week from whom?

7-17-09 Hearing

- 24 -

Robin Murray - Direct

1 A. From PennMont from the account.

2 Q. Did you forward payment with regard to all the requests  
3 in this e-mail?

4 A. No, we did not.

5 Q. Which did you not forward payment?

6 A. Koresko Law Firm, legal services fee.

7 Q. Why did you not forward payment with regard to that  
8 request?

9 A. Upon consultation with our counsel, we decided not to do  
10 that, but also, they did not include an invoice backing the  
11 request.

12 Q. What was the issue as to why it was not forwarded upon  
13 consultation with the counsel?

14 A. Because we did not receive proper documentation.

15 MS. HENRY: I move for the admission of Government  
16 Exhibit 7.

17 THE COURT: Any objection?

18 MR. KORESKO: Your Honor, to streamline matters, I  
19 just have a continuing objection to any of the e-mails that  
20 the government --

21 THE COURT: I have a policy of no continuing  
22 objections.

23 MR. KORESKO: Okay.

24 THE COURT: You must state your objection for the  
25 record.



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Robin Murray - Direct

1 MR. KORESKO: All right, it's a Gramm-Leach-Bliley  
2 objection, Your Honor.

3 THE COURT: All right, overruled. Exceptions noted.

4 It is admitted. Thank you very much.

5 BY MS. HENRY:

6 Q. Ms. Murray, I'm showing you what's been marked as  
7 Government Exhibit 8. Do you recognize this document?

8 A. Yes.

9 Q. What is this document?

10 A. This is an e-mail that I sent to Larry Townsend in  
11 response to the previous exhibit.

12 Q. Why did you send this e-mail -- well, first of all,  
13 Townsend, you testified before, is with PennMont?

14 A. Yes.

15 Q. And why did you send this e-mail to Larry Townsend?

16 A. We -- I was just mentioning to him that it's our  
17 department's policy to have the documentation on these types  
18 of plans on which we serve as trustee and that's what -- I

19 sending him an e-mail requesting the information.

20 Q. Did you receive any information regarding participating  
21 employer plan documents as was stated in the e-mail?

22 A. No.

23 Q. Why were you requesting employer plan documents?

24 A. It's our department's policy.

25 Q. And why is it the policy to have those documents?

7-17-09 Hearing

- 26 -

Robin Murray - Direct

1 A. Because as a fiduciary responsibility, we need to know  
2 what payments are being distributed out of our clients'  
3 accounts.

4 MS. HENRY: I move for the admission of Government  
5 Exhibit 8.

6 THE COURT: Any objection?

7 MR. KORESKO: Only a Gramm-Leach-Bliley objection.

8 THE COURT: All right, objection overruled.  
9 Exception noted. It is admitted.

10 MS. HENRY: May I approach, Your Honor?

11 THE COURT: Yes.

12 BY MS. HENRY:

13 Q. Ms. Murray, I am showing you Government Exhibit 9 which  
14 has at the top Robin Murray, checks and wires,  
2009.06.09.419.

15 Do you recognize this document?

16 A. Yes.

17 Q. What is this document?

18 A. It's an e-mail that I received from Larry Townsend from  
19 PennMont.

both 20 Q. And in these e-mails, did you receive these e-mails,

21 in this exhibit and the previous exhibits the same day that  
22 they were marked on the e-mail?

23 A. Yes.

24 Q. Is this an e-mail that is requesting payments?

25 A. Yes.

7-17-09 Hearing

- 27 -

Robin Murray - Direct

1 Q. Did F&M Trust forward all the payments that were  
2 requested in this e-mail to PennMont?

3 A. No, we did not.

4 Q. Which payments did you not forward?

5 A. Legal fees that were requested to be paid to Caplin  
6 Drysdale Attorneys.

7 Q. Why did you not forward the legal fees requested for  
8 Caplin Drysdale Attorneys?

9 A. We did not receive the required documentation, the  
10 supporting documentation.

11 THE COURT: Excuse me, what is the required and  
12 supporting documentation that you speak of?

13 THE WITNESS: We, like, in our department, our  
policy  
14 is to have supporting documentation to back up these  
requests.  
15 we don't like to pay a bill that we don't know what it  
16 represents.

17 THE COURT: Can you give me an example?

18 THE WITNESS: Well, say, if you wanted me to pay you  
19 a hundred dollars out of --

20 THE COURT: Let's not use me for payment.

21 THE WITNESS: Okay, sorry. Okay, so in this case,  
we  
22 would want a bill from the attorney's office itemizing the  
23 fees. That way, then, we know what the fees represent.

24 THE COURT: Thank you, you may continue.

25 BY MS. HENRY:

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Robin Murray - Direct

1 Q. And I think you had testified earlier, Ms. Murray, that  
2 in some cases you received an invoice and still no payment  
was  
3 forwarded.

4 A. Yes.

5 Q. And was not payment forwarded when -- even in those  
cases  
6 where you did receive an invoice.

7 A. We did not feel they were allowable expenses for the  
8 plan.

9 MS. HENRY: I move for the admission of Government  
10 Exhibit number 9.

11 THE COURT: Any objection?

12 MR. KORESKO: Privilege under the Gramm-Leach-Bliley  
13 Act, Your Honor.

14 THE COURT: Overruled, exception is noted. It is  
15 admitted.

16 MS. HENRY: May I approach, Your Honor?

17 THE COURT: Yes.

18 BY MS. HENRY:

19 Q. I'm showing you Government Exhibit 16 which is an e-mail  
20 from Gene Bonnie. What is the date on that e-mail?

21 A. June 17th.

22 Q. And is it addressed to yourself?

23 A. Yes.

24 Q. Did you receive that e-mail on June 17th?

25 A. Yes.

7-17-09 Hearing

- 29 -

Robin Murray - Direct

1 THE COURT: The year, please. I'm sorry.

2 THE WITNESS: Oh, 2009.

3 Q. What was the topic of that e-mail? Why was that e-mail  
4 sent to you?

5 A. She was sending me a plan documentation. The type of  
6 arrangement -- I'm trying to think here, read here -- it was  
7 in response to the request that we had sent to her  
previously.

8 Q. Did you review this e-mail when you received it?

9 A. Yes, I did, and I forwarded it on to our counsel.

10 Q. After you received this e-mail, was any payment  
11 in response to the request from PennMont?  
forwarded

12 A. No.

13 Q. Why not?

14 A. We still did not feel that they were allowable expenses.

15 Q. And why didn't you feel they were allowable expenses?

16 A. Because they were tax issues.

17 THE COURT: And again, what do you mean by that?

18 THE WITNESS: The invoices that we had received from  
19 them -- we received two invoices itemizing the bills for  
20 fees, and they were for tax issues, and we did not feel that  
21 they were allowable expenses for this type of plan.  
legal

22 THE COURT: What's a tax issue, is my question.

23 THE WITNESS: That's what they have in their -- they  
24 were tax cases, I guess they were fighting -- the attorneys  
25 were meeting -- I can't -- they were for trial prep and

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Robin Murray - Direct

1 reviewing the records and things for tax cases that Koresko's  
2 law firm were fighting for some of the participants of the  
3 plan.

4 THE COURT: Thank you, you may continue.

5 MS. HENRY: I would move for the admission of  
6 Government Exhibit number 15.

7 THE COURT: Any objection?

8 MR. KORESKO: Only the Gramm-Leach-Bliley objection.

9 THE COURT: Overruled, exception is noted. It is  
10 admitted.

11 BY MS. HENRY:

12 Q. Ms. Murray, did there come a time when you learned that  
13 the PennMont had discharged or attempted to remove F&M as the  
14 trustee of the SEP or REAL VEBA trust?

15 A. Yes.

16 Q. And how did you learn that?

17 A. Through our counsel.

18 Q. And what did you learn?

19 A. That they had removed us from -- that they were removing  
20 us from being the trustee on the account.

21 Q. Did you learn anything about any directions as to where  
22 to transfer the money, once F&M Trust was removed?

23 A. Yes, they were to be transferred to Penn Public Trust.

24 Q. What, if anything, did you learn about Penn Public  
Trust.

25 A. I know that it's a company that Mr. Koresko owns or is

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Robin Murray - Direct

1 connected to, affiliated with.

2 Q. How much money currently is in this trust?

3 A. Around four million dollars.

4 Q. And has this trust -- has the money in this trust, any  
of

5 it, been transferred --

6 A. No.

7 Q. -- to Penn Public Trust?

8 A. No, it has not.

9 MS. HENRY: Nothing further from this witness.

10 THE COURT: You may cross-examine.

11 MR. KORESKO: Your Honor, would you mind if I work  
12 from here?

13 THE COURT: Fine.

14 CROSS-EXAMINATION

15 BY MR. KORESKO:

16 Q. Ms. Murray, I'd like to go back, please, to the  
beginning  
17 of your testimony. By the way, I'm John Koresko, and I  
18 represent the defendants in this case. Where did you derive  
19 your knowledge about this account, the account being -- this  
20 account being the REAL VEBA and single employer plan account.

21 Where did you derive your knowledge?

22 A. We have reviewed the documents in our department. I  
23 reviewed it with the head of our department and the ERISA rep  
24 that we have in our department.

25 Q. When?

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Robin Murray - Cross-Examination

- 1 A. December 2008.
- 2 Q. Did you review a file?
- 3 A. I'm sorry?
- 4 Q. Was there a file?
- 5 A. We reviewed the plan documents that we had that Sue
- 6 Russell had supplied to us.
- 7 Q. Who's Susan Russell?
- 8 A. She's an employee of F&M Trust Company.
- 9 Q. What did she do before that?
- 10 A. She was CEO and president of Community Trust Company.
- 11 Q. And what was her primary responsibility?
- 12 MS. HENRY: Objection, knowledge. At CTC, at F&M?
- 13 THE COURT: More specific, please, counsel.
- 14 Q. What was her specific response -- what are her specific
- 15 responsibilities at F&M Trust Company?
- 16 A. She is a trust officer.
- 17 Q. And which accounts does she have responsibility for her?
- 18 A. The accounts that have been assigned to her.
- 19 Q. And isn't the REAL VEBA and single employer plan account
- 20 assigned to her?
- 21 A. Yes.
- 22 Q. And hasn't it been her responsibility for about ten
- 23 years?
- 24 A. Yes.
- 25 MS. HENRY: Objection.



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Robin Murray - Cross-Examination

1 Q. You did review the file, right?

the

2 THE COURT: Just one second, please. Let me hear

3 basis for the objection.

4 MS. HENRY: Objection in that knowledge of the

a

5 witness. This account has been with F&M Trust for less than

6 year.

7 MR. KORESKO: Your Honor.

8 THE COURT: Just one second, please. Let me rule.

9 The objection's overruled. If you know the answer to the  
10 question, you may answer it. Otherwise, indicate that you  
11 don't know.

12 BY MR. KORESKO:

13 A. Yes, as far as I know, that's how long -- I don't know  
14 for sure how long she's been over that account.

15 Q. And how long have you been involved with the account?

16 A. Since the merger.

17 Q. And who -- since the merger. That's December the 30th,  
18 2008?

19 A. No, it was November 30, 2008.

20 Q. November 30, 2008. So you have approximately -- this is  
21 July, so you've been involved with this account, so to speak,  
22 for eight months?

23 A. Yes.

24 Q. And Ms. Russell has been involved for ten years.

25 A. Yes.

7-17-09 Hearing

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Robin Murray - Cross-Examination

1 Q. Now, can you tell me what was in the file that you  
2 reviewed about this account?

3 A. We had the documents, the plan documents. It was the  
4 agreements. That's what we reviewed?

5 Q. Can you tell me which agreements?

6 A. I can't recall them right now.

7 Q. Was there a trust document?

8 A. Yes.

9 Q. For what trust?

10 A. For the REAL VEBA and the single employer account.

11 Q. What does REAL VEBA stand for?

12 A. Oh, my goodness. I know it and I can't think right now.

13 I don't know.

14 Q. What is a VEBA?

15 MS. HENRY: Objection, relevance.

16 THE COURT: Overruled.

17 A. It is an account where we can -- where you have  
18 in the plan where they can -- or, companies in the plan where  
19 they can buy insurance policies and to fund they're life  
20 insurance. And you pay medical benefits. I --

21 Q. Are you making reference to documents in front of you,  
22 now?

23 A. No.

24 Q. So you're saying a VEBA is an account?

25 A. Yes.

7-17-09 Hearing

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Robin Murray - Cross-Examination

1 Q. And what is the statutory authorization for a VEBA?

2 A. I don't know.

3 Q. What do the regulations on the Internal Revenue Code  
4 allow a VEBA to do?

5 A. These are not my job --

6 MR. NIEMAN: Object.

7 THE COURT: The objection's sustained.

8 Q. You're a trust officer, correct?

9 A. No, I'm trust operations manager.

10 Q. Is it your position that if the statute of regulations  
11 allows something to be paid, that you have the unilateral  
12 authority to overrule --

13 A. Not myself.

14 Q. -- the regulations or statute?

15 MR. NIEMAN: Your Honor, I'm -- objection, again.

16 Mr. Koresko said, in his opening remarks, when he objected  
17 that she's not an attorney and not here to testify as an  
18 attorney, he's asking her, now, to make legal conclusions and  
19 legal determinations on the stand.

20 THE COURT: Based upon the testimony that has been  
21 adduced thus far, the witness has testified that she's made  
22 some decisions, but they've been made primarily because they  
23 were directed by another individual who, I believe, was  
24 identified as counsel. To the extent that the witness can  
25 testify that she's made some independent decisions, you're

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Robin Murray - Cross-Examination  
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7-17-09 Hearing

1 allowed to ask her the question as to what decision she made  
2 and on what basis she made those decisions. Beyond that, the  
3 objection's sustained.

4 MR. KORESKO: Your Honor, I just want to understand.

5 Are you suggest -- in footnote 6 of our memorandum that we  
6 provided to you, we elucidated the application of the  
7 fiduciary exception to the attorney-client privilege in cases

8 of this type. If -- I want to understand -- if she got her  
9 information from her attorneys -- I'm sorry -- is your ruling

10 that she basically doesn't have to tell or testify --

11 THE COURT: Oh, absolutely, no, no. It has nothing  
12 to do with privilege.

13 MR. KORESKO: Okay.

14 THE COURT: It has to do with competence.

15 MR. KORESKO: Okay. That's fine.

16 BY MR. KORESKO:

17 Q. What does regulation Section 1.501(c)(9)-3(e) of the  
18 Internal Treasury Regulations provide with respect to the  
19 benefits payable by a VEBA trust?

20 MS. HENRY: Objection.

21 THE COURT: Sustained.

22 Q. Have you ever reviewed the regulations?

23 A. No.

24 Q. Do you -- don't you think that reviewing applicable  
25 government regulations involving a plan is important?

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is

1 A. As trust operations manager, that is not my job. That  
2 the administrator on the account's position, and the head of  
3 our department.

4 Q. And that's Susan Russell?

5 A. Yes.

6 Q. And Susan Russell directed you not to make --

7 A. She is, no --

8 Q. -- any payments?

9 THE COURT: Counsel, let her answer the question.

10 And madam, please let him complete the question.

11 A. She is the trust officer on the account. She is not the  
12 head of the department. But, yes.

13 Q. And who is the head of the department?

14 A. Tom Peterson.

15 Q. And Tom Peterson directed you not to make any of the  
16 expenditures?

17 A. No, our counsel did.

18 Q. So what you're saying is that at the direction of  
19 counsel, you may know -- you refuse to take the direction of  
20 the plan administrator?

21 A. With the -- yes. We consulted with them and we came to  
22 that decision.

23 Q. Didn't counsel have the trust documents and the plan  
24 documents?

25 A. Yes.

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Robin Murray - Cross-Examination

1 Q. So why did they need additional copies of the trust  
Page 37

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these 2 documents and the plan documents that are referred to in  
3 e-mails?

4 A. Oh, you're -- no, we don't have all those documents that  
5 include all of the participants.

6 Q. What is a participant?

7 A. It's a member of the -- someone that participates in the  
8 plan.

9 Q. Employers aren't participants, are they?

10 A. No, but their employees are.

11 Q. Where, in the trust documents, does it provide that you  
12 are entitled to demand any of the information regarding the  
13 individual participants?

14 A. As our fiduciary responsibility, that's what our  
15 department policy is.

16 MR. KORESKO: Move to strike for it's nonresponsive.

17 THE COURT: Overruled.

have 18 Q. Where in the plan documents does it provide that you  
19 the privilege?

20 A. It's our department policy.

have 21 Q. Where in the plan documents does it provide that you  
the 22 the privilege to ask for additional information that is in

23 discretion of the plan administrator to provide you?

24 A. As a fiduciary on this account, it's our responsibility  
25 to do it anyway.

7-17-09 Hearing  
Robin Murray - Cross-Examination

1 Q. So may I take your answer to be that you don't know?

2 A. Take it, I guess, however you need to. That's our  
3 policy.

4 Q. I'd like your answer, please.

5 A. That's our policy.

6 MR. KORESKO: Your Honor, I don't wish to belabor  
the

7 point, but I'd ask the Court to either direct the witness to  
8 answer or to just say she doesn't know.

9 THE COURT: She said that's, quote, "that's our  
10 policy".

11 MR. KORESKO: That's our policy.

12 Q. Do you have a handbook --

13 A. Not with me.

14 Q. -- of policies?

15 A. Not with me, but I do at my desk.

16 Q. Did you ever send it to -- when F&M took over this  
17 relationship -- by the way, is there any contract between  
18 PennMont and F&M Trust Company?

19 A. All of Community Trust Company's accounts merged into  
F&M  
20 Trust through the merger agreement.

21 Q. So you're bound by the agreements made by Community  
Trust  
22 Company?

23 A. Yes.

24 Q. So Community Trust Company didn't demand this  
information  
25 prior to your demands, correct?

7-17-09 Hearing  
Robin Murray - Cross-Examination

1 A. That's correct.

2 Q. Do you have any reason to doubt, based upon the review  
of  
3 the file, that the course of conduct over ten years was that  
4 that information you asked for was not relevant or required  
in  
5 the context of the operation of the trust?

6 MS. HENRY: Objection.

7 THE COURT: Sustained.

8 A. I can't --

9 THE COURT: It's sustained.

10 THE WITNESS: I'm sorry.

11 THE COURT: You don't have to answer that.

12 THE WITNESS: I'm sorry. Thank you.

13 BY MR. KORESKO:

14 Q. What was the course of conduct relating to the demand or

15 the request for payments prior to your becoming involved.

16 A. I do not know what Community Trust Company's procedures  
17 were.

18 Q. Did you review the file to see if there were any  
19 rejections?

20 A. No, I did not.

21 Q. Would it surprise you that there were never any  
22 rejections?

23 A. No, it would not.

24 Q. As a matter of fact, don't you know, as a matter of  
fact,  
25 that there were never any rejections?



7-17-09 Hearing  
Robin Murray - Cross-Examination

1 A. Yes.

2 Q. Don't you know, as a matter of fact, that Susan Russell  
3 took absolute direction from PennMont on all matters relating  
4 to the plan of trust?

5 A. Yes.

6 Q. Don't you know, as a matter of fact, that this  
particular  
7 new policy that you imposed on this relationship was done at  
8 the direction of your lawyers?

9 A. It was done on the direction of our own policy in our  
10 department. We do this for all of our accounts.

11 Q. When did PennMont agree to that policy?

12 A. PennMont -- this account became F&M Trust Company's.

13 Q. When did PennMont agree to that policy?

14 A. I don't think they have.

15 Q. What consideration was given by F&M Trust Company to any  
16 participant or PennMont for the obligations of your policy  
17 that you imposed?

18 A. We feel as a fiduciary, it's our responsibility to do  
19 what's right for the participants.

20 Q. What consideration did you give -- that is, what  
21 agreement did you give, what promise did you give as a  
22 consider --

23 A. We did not.

24 Q. You didn't give anything? So you basically imposed  
this?

25 A. It's our policy.

7-17-09 Hearing  
Robin Murray - Cross-Examination

question? 1 Q. You imposed it. Can you please just answer the

2 A. I did.

3 Q. And it's your policy, and you imposed this unilateral

4 requirement, correct?

5 A. It's our policy, so yes, we began to process things that

6 way. It's different.

7 Q. What's different?

8 A. The way we process things.

9 Q. Is there anywhere in the plan trust documents that

10 prevent PennMont from firing you?

11 A. No.

12 Q. For any reason or for no reason, right?

13 A. Yes.

took 14 Q. And isn't it true that before this relationship even

15 place with Community Trust Company, the file reflects that

16 Penn Public Trust was the initial trustee of this --

17 predecessors to these plans, correct?

18 A. Yes.

19 Q. Penn Public Trust Company is a nonprofit corporation,

20 correct?

21 A. Yes.

22 Q. How do you know that John Koresko owns it?

23 A. I saw it on the Internet that you were connected with

it. 24 Q. You saw it on the Internet.

25 A. Yes.

7-17-09 Hearing  
Robin Murray - Cross-Examination

1 Q. From the DOL website?

2 A. No, from yours.

3 Q. From our website? Penn Public Trust? That's not true,  
4 is it?

5 A. I looked on the Internet to see what the connection was  
6 with you. I know that you're related somehow with that, and

I

7 don't know -- directly, I don't recall it right now. But I  
8 know that you are connected with that company.

9 Q. What other part of your testimony did you derive from  
10 third-party sources and not your own experience?

11 A. None.

find

12 Q. Well, you just said that you went to the Internet to

13 out a critical fact. You were fired in favor of Penn Public  
14 Trust, correct? You were fired. Correct?

15 A. Yes.

16 Q. You were fired before this temporary restraining order  
17 was filed, or motion for it was filed, correct?

18 A. Yes.

get

19 Q. And how much are trustee fees, does F&M Trust Company  
20 each year in connection with this account?

21 MR. NIEMAN: Objection, Your Honor. It has no  
22 relevance to the proceeding today what the --

23 THE COURT: Sustained.

24 MR. NIEMAN: -- fee may be.

25 THE COURT: Sustained.

7-17-09 Hearing

consider 1 MR. KORESKO: Your Honor, I would ask you to

2 the fact that the pecuniary interest of F&M Trust Company is  
3 part of the issue here, today.

4 THE COURT: I'll reverse that. I'll allow it. Go  
5 ahead.

6 BY MR. KORESKO:

7 A. We receive a little over 3000 dollars a month, but we  
8 have not received a fee since March.

9 Q. And does the file reflect any accounting for your fees?

10 A. I'm sorry, repeat, please?

11 Q. An accounting for your fees, for the CTC and F&M Trust  
12 Company. Does the file refer to anything there?

13 A. Yes, it does. We receive a file every time we request a

14 fee to be charged, we receive a file from Gene Bonnie listing

15 all the participants in the account.

16 Q. I -- wait a minute.

17 A. Or all the companies that are in the account.

18 Q. Maybe I wasn't clear. You don't provide a set of  
19 documents or accounting relating to the services that you do.

20 A. No.

21 Q. No, you just charge, right?

22 A. Yes.

23 Q. So you've objected to a demand made by the discretionary

you 24 administrator because they did exactly the same thing that

25 did, correct?

7-17-09 Hearing

Robin Murray - Cross-Examination

1 A. I don't agree with that.

2 Q. What about the Gates law firm. You paid them, right?

3 A. Yes.

4 Q. And there wasn't any accounting in the file of Gates law  
5 firm's time, right?

6 A. Yes. That's right.

7 Q. And they've continued to represent F&M Trust, CTC in the  
8 third circuit in the present case, right?

9 A. That's not so.

10 Q. No, you just fired them. You just fired them, only,  
11 what, two weeks ago?

12 A. I don't think so. I don't think that's correct.

13 Q. If I were to tell you that the records of the United  
14 States District Court -- I'm sorry, for the United States  
15 Court of Appeals and the United States District Court

reflects

16 that the Gates law firm was -- did not withdraw their  
17 appearance until last week, would that surprise you?

18 A. Yes.

19 Q. Why is that?

use,

20 A. Because we -- our bank has our own attorneys that we  
21 and Lowell Gates is not --

22 Q. So --

what

23 THE COURT: I'm sorry, what was the last part of  
24 you said?

25 THE WITNESS: Lowell Gates is not our bank's

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Robin Murray - Cross-Examination

1 attorneys.

2 Q. Have you reviewed the dockets of the various cases?

3 A. No.

4 Q. No, so you don't know whether Lowell Gates is your  
5 attorney at all, do you?

6 A. I'm pretty sure that I don't -- I know that he's not  
7 representing our bank.

8 Q. He never represented F&M Trust Company?

9 A. I don't know that information.

10 Q. Who told you that Mr. Gates never represented F&M Trust  
11 Company?

12 MS. HENRY: Objection, misstating the witness's  
13 testimony and relevance.

14 THE COURT: Sustained.

asked

15 Q. I'd like to go back to a particular question that I  
16 you. What provision of the trust document allowed you or  
17 required you to take information relating to individual  
18 participants?

19 MR. NIEMAN: Your Honor, this has been asked and  
20 answered, four, five, six times already today.

21 THE COURT: Sustained.

22 Q. Do you have all the amendments that were made to the  
23 document?

24 A. They're in our files back in the office, yes.

25 Q. So you have the amendment that was done March 7, 2007?

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Robin Murray - Cross-Examination  
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1 A. I haven't -- I don't know the dates on any of the  
2 agreements, so I can't tell you.

3 Q. I'd like to read it to you.

4 MR. KORESKO: Your Honor, this is already of record  
5 in the Court. It's Exhibit 30 to Ms. Bonnie's affidavit.

6 THE COURT: Let me hear it offered as proof, please.

7 MR. KORESKO: Your Honor, there was an amendment to  
8 allow legal services payments that was provided March 7, 2007

9 to Lowell Gates and to Susan Russell. This particular  
10 amendment is contradictory --

11 THE COURT: Let me just say this, counsel. Assuming  
12 that that's accurate, and I have no reason to disbelieve that

13 it is, I assume you would stipulate to that and cite that  
14 portion in this record and let me go from there --

15 MR. KORESKO: Okay.

16 THE COURT: -- by reading it myself --

17 MR. KORESKO: Yes, sir.

18 THE COURT: -- which has nothing to do with this.

19 MR. KORESKO: I'll be happy to --

20 MR. NIEMAN: Your Honor, I will not stipulate to  
that

21 because we've never seen a signed copy of this amendment.

22 we've seen reference to it in a letter that was sent to my  
law

23 firm, but we've never actually seen the amendment, and our  
24 review of the files has not shown this amendment --

25 THE COURT: Then you don't need to stipulate.

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Robin Murray - Cross-Examination

I'm 1 MR. NIEMAN: -- in any shape or form. That's shy  
2 standing up to object.  
3 THE COURT: I understand.  
4 MS. HENRY: And the Department of Labor has the same  
5 objection, Your Honor. We have seen, as of last night, a  
6 letter that was written to a law firm that supposedly cited  
to 7 this amendment. In all of our documents, we have not seen  
8 this amendment.  
9 THE COURT: All right, then one, because it as  
issue, 10 the Court certainly will not extract or exact a stipulation.  
11 Two, if you choose to do so, Mr. Koresko, in your case in  
12 chief, it's conceivable you can introduce that document. But  
13 not through this witness's cross-examination.  
Your 14 MR. KORESKO: I think I've gotten what I wanted,  
15 Honor, that she's never seen the amendment. Thank you.  
16 THE COURT: Maybe you didn't hear what I said.  
17 MR. KORESKO: Yes, sir, I did.  
18 THE COURT: The objection's sustained.  
19 MR. KORESKO: Thank you.  
20 THE COURT: All right. Mr. Koresko, your binder, I  
21 believe, is labeled as exhibits for the motion to dismiss.  
22 MR. KORESKO: This is related to Gene Bonnie's  
23 affidavit, Your Honor.  
24 THE COURT: Well, I mean, this huge binder that was  
25 submitted.



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Robin Murray - Cross-Examination

1 MR. KORESKO: Yeah, that's what I'm referring to.  
2 The affidavit was filed in anticipation of this particular  
3 hearing. Unfortunately, Your Honor, we haven't -- we haven't  
4 filed a written response to the motion itself --

5 THE COURT: I know.

6 MR. KORESKO: -- formally.

7 THE COURT: I know. But nevertheless, you've  
8 submitted this binder.

9 MR. KORESKO: Yeah, that's of record, yes sir.

10 THE COURT: But it's actually -- contains exhibits  
in  
11 opposition to this temporary restraining order request?

12 MR. KORESKO: Well, it certainly does, and we  
believe  
13 that under the incorporation by reference rules that we're  
14 permitted to incorporate, or we would ask Your Honor to  
accept  
15 that this matter filed of record, that this affidavit filed  
of  
16 record and the accompanying exhibits be considered as  
17 incorporated by reference to the response which Your Honor  
18 will hopefully give us the opportunity to provide. But  
19 Ms. Bonnie's here and she will testify directly to what's in  
20 here.

21 THE COURT: All right, you may continue.

22 BY MR. KORESKO:

23 Q. What legal training have you had, Ms. Murray?

24 A. None.

25 Q. None. All right, you're accountant?

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Robin Murray - Cross-Examination

1 A. No.

2 Q. What -- do you have any professional designations at  
all?

3 A. I have worked in the trust business for twenty years,  
and

4 I have gone to trust school.

5 Q. What kind of trust school?

6 A. Cannon.

7 Q. Cannon?

8 A. Yes, it's the name of the school.

9 Q. And are they a law school?

10 A. No.

11 Q. And are they --

12 A. They teach trust law.

13 Q. They teach -- they're not a law school?

14 A. No, as far as I know, no.

15 Q. And exact -- in the last twenty years, you've been in  
the

16 business, right?

17 A. Yes.

18 Q. And the last twenty years, how much of your -- how much  
19 time did the Cannon course take?

20 A. I did two weeks of schooling.

21 Q. Two weeks in twenty years. And when was that? When was  
22 the last time you were in school?

23 A. Five years ago.

24 Q. Have you reviewed any of the Supreme Court precedent  
25 since then --

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Robin Murray - Cross-Examination

1 A. No.

2 Q. -- on duties of an administrator or trustee?

3 A. No.

4 Q. Were you involved in compiling the 3000 documents or  
more  
5 that were given to the Department of Labor by F&M Trust  
6 Company?

7 A. Yes.

8 Q. You gave them all over, right? Everything --

9 MS. HENRY: Objection, relevance.

10 THE COURT: Sustained.

11 Q. Everything that you had in the account, you gave it  
over,  
12 right?

13 MS. HENRY: Objection, relevance.

14 THE COURT: Sustained.

15 MR. KORESKO: Your Honor, I would ask you to accept  
16 that this also goes to the pecuniary interest of Community  
17 Trust Company, F&M.

18 THE COURT: Sustained.

19 BY MR. KORESKO:

20 Q. What exactly did you give to the Department of Labor?

21 A. I did not give --

22 MS. HENRY: Objection.

23 MR. NIEMAN: Your Honor, same objection. This is  
24 irrelevant.

25 THE COURT: The objection's sustained. Counsel,

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Robin Murray - Cross-Examination

1 please move on.

2 BY MR. KORESKO:

3 Q. Did you receive a subpoena from the Department of Labor?

4 A. Yes.

5 Q. When?

6 A. I was notified about it on Tuesday, Wednesday.

7 Q. So you received --

8 A. Wednesday.

9 Q. -- a subpoena to appear here --

10 A. Yes.

11 Q. -- but you never received a subpoena before?

12 A. No.

13 Q. Is it the policy of the trust company to just turn over  
14 documents to whoever asked?

15 MS. HENRY: Ob --

16 THE COURT: Sustained.

17 Q. Do you know what the policy of the trust company is with  
18 respect to surrendering documents?

19 MS. HENRY: Objection.

20 MR. NIEMAN: Your Honor, I'm going to object to this  
21 whole line of questioning. There's no --

22 THE COURT: The Court is sustaining your objection.

23 MR. NIEMAN: Thank you, Your Honor.

24 THE COURT: Please move on, Mr. Koresko. You have  
25 very limited time.

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Robin Murray - Cross-Examination

1 BY MR. KORESKO:

2 Q. I'd like to go back to -- I don't know -- we got off  
3 track regarding the representation of Lowell Gates. Was  
4 Lowell Gates' firm paid out of the trust company accounts?

5 A. Yes.

6 Q. And what backup information is there in the file  
relating  
7 to Lowell Gates' legal services?

8 MS. HENRY: Objection, asked and answered.

9 THE COURT: Sustained.

10 Q. What benefits does this trust allow?

11 A. Medical benefits, insurance premiums -- is that what  
12 you're asking?

13 Q. Yeah.

14 A. Okay. We pay -- is that what you're asking, what we  
pay?

15 Q. No.

16 A. Can you please restate it?

17 Q. No, I'm asking you what does the trust permit?

18 A. I don't understand your question, please.

19 Q. You know what the trust document said, right?

20 A. I reviewed it months ago, yes.

21 Q. What benefits does the trust document permit?

22 A. From -- I don't know if this is the answer, but this is  
23 what I'm thinking. It's insurance premiums and medical  
24 benefits and education expenses.

25 Q. Medical benefits. How -- what is -- isn't it true that

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7-17-09 Hearing  
Robin Murray - Cross-Examination

1 you're simply asked to reimburse insurance? Right?

2 A. Yes.

3 Q. You don't evaluate medical claims, right?

4 A. No.

5 Q. You don't send checks to doctors, right?

6 MR. NIEMAN: Your Honor, I'm going to object again.

7 I don't see the relevance of this line of questioning to what

8 we're here --

9 THE COURT: I'm going to overrule the objection for  
10 now. I'm going to see where counsel's going with this. You  
11 may answer the question.

12 A. The check requests that we receive each week will tell  
us

13 what we need to pay. And they can be insurance companies or  
14 beneficiaries in the account.

15 Q. Reimbursements.

16 A. Yes.

17 Q. But you -- other than what you receive relating to the  
18 expenditures, themselves, you don't inquire behind them,  
19 correct?

20 A. I'm sorry, please restate that?

21 Q. You don't inquire behind the notices that you get to  
make

22 payments, correct?

23 A. No.

24 Q. I'd like to -- you got -- this was a Government Exhibit  
25 16, I'm sure you've seen that, right?

7-17-09 Hearing  
Robin Murray - Cross-Examination

1 A. Yes.

2 Q. Did you review the provisions in this -- I'm sorry. Did  
3 you review the components of this e-mail, the content?

4 A. I read through them and the head of our department also  
5 did, and then we forwarded them to counsel.

6 Q. Did you match them up with documents that you had on  
7 file?

8 A. No, I did not.

9 Q. Did your boss?

10 A. I don't know.

11 Q. And how do you know that Ms. Bonnie was not giving you  
12 accurate information?

13 MR. NIEMAN: Objection to the question. I don't  
14 believe that --

15 THE COURT: Sustained. You may rephrase.

16 Q. Do you know if these provisions are the provisions of  
the trust document?

18 A. No, I do not.

19 Q. And what was the source of your quote, unquote,  
20 discretion to reject the validity of Ms. Bonnie's assertions  
21 that these were, in fact, portions of an applicable trust  
22 document.

23 MS. HENRY: Objection.

24 THE COURT: Sustained.

25 Q. What was the basis of -- let me just ask this. You

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1 didn't comply with Ms. Bonnie's request for any of the  
2 disbursement that you denied, correct?

3 A. Correct.

4 Q. Let's -- do you have any reason to believe that what  
5 Ms. Bonnie says here is not in the trust document?

6 A. No.

7 Q. In fact, you reviewed the trust document, right?

8 A. Yes, I did.

9 Q. Okay, let's go to 3.1. At -- it says payment of benefit

anything 10 at the direction of the plan administrator. Is there

11 unclear about that?

12 A. No.

13 MS. HENRY: Objection.

14 Q. The trustee --

15 THE COURT: Let me just hear the objection. Yes,  
16 counsel?

17 MS. HENRY: Objection that, for one, he's reading  
18 from an e-mail, not the actually trust agreement.

19 THE COURT: Sustained.

20 BY MR. KORESKO:

21 Q. So you do not know -- I'm sorry, you already answered --

document, 22 you didn't actually check this with the actual trust

23 right?

24 A. No, I did not.

25 Q. Why not?



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1 A. We forwarded this on to our counsel by this point.

2 Q. And what was the basis of your counsel's decision?

3 MR. NIEMAN: Your Honor, I'm going to object to  
this.

4 Now we're starting to get into attorney --

5 THE COURT: Is counsel going to testify?

6 MS. HENRY: Yes.

7 MR. KORESKO: If I -- is counsel going to testify?

8 THE COURT: No, I'm asking DOL's counsel.

9 MS. HENRY: At this point, yes, the department has  
10 subpoenaed and will call.

11 THE COURT: The objection's sustained.

12 MR. KORESKO: Your Honor, I have to --

13 THE COURT: Take an exception to the Court's ruling?

14 MR. KORESKO: Yes, take an exception because.

15 THE COURT: Granted, now move on.

16 BY MR. KORESKO:

17 Q. Do you have any other -- have you had any experience  
with

18 directed arrangements other than the one that's at issue,  
19 here?

20 A. You mean self-directed accounts? Yes, we do.

21 Q. Does your procedures manual provide guidance to you  
22 regarding self-direction?

23 A. Yes.

24 Q. And could you tell us what that procedures manual says?

25 A. I don't have them memorized. As our, per policy in our

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Robin Murray - Cross-Examination

1 department, we question what they direct us to do.

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PennMont

2 Q. When was the first time that you communicated to

3 or members of Koresko Law Firm that you were going to impose  
4 this policy?

5 A. When we received the e-mail requesting 85,000 dollars to  
6 be paid to your law firm.

7 Q. Do you believe that lawyers are required to disclose  
8 privileged information to you?

9 THE COURT: Sustained.

10 MR. NIEMAN: Objection, Your Honor.

11 THE COURT: Sustained.

12 BY MR. KORESKO:

13 Q. Is the policy of your bank, does the policy of the bank  
14 contain a provision that requires you to obtain privileged  
15 information?

16 MS. HENRY: Objection.

17 THE COURT: Sustained, counsel.

18 Q. Can you quote to any provision of the policies and  
19 procedures manual of F&M Trust Company that requires you, in  
20 order to satisfy a self-directed request, to require the  
21 surrender of privileged information.

22 MS. HENRY: Objection.

23 THE COURT: Do you understand that question?

24 THE WITNESS: Yes.

25 THE COURT: Answer it, please.

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Robin Murray - Cross-Examination

1 A. Can you ask it again? I forget.

2 Q. Are you familiar with any provision of your policies and  
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of 3 procedures manual that requires you to demand the surrender  
4 privileged information in connection to a self-directed trust  
5 request?  
6 A. No.  
7 Q. So you would agree, then, that if the information that  
no 8 would be communicated to you would be privileged, there was  
9 requirement, even in your procedures manual, to give it.  
10 MS. HENRY: Objection, relevance.  
11 THE COURT: Overruled. Is there an answer?  
12 A. I don't -- what -- can you say it again? This is just  
--  
13 can you repeat, please?  
14 Q. I'm sure the reporter doesn't have it.  
15 MR. KORESKO: Do you have the ex -- can you please  
16 read that back to me?  
17 COURT REPORTER: And you agree any info or  
18 communications to you would be privileged.  
19 Q. Would you agree, then, that your policy and procedures  
20 manual, that there's no requirement to disclose privileged  
21 information in connection with a request in a self-directed  
22 situation.  
23 A. Can you restate that? I'm -- it's --  
24 Q. All right, the policy and procedures manual does not  
to 25 require you in the satisfaction of a self-directed request,

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Robin Murray - Cross-Examination

1 obtain information containing privileged -- I'm sorry,  
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2 information which is privileged or contains privileged  
3 information. Is that correct?  
4 A. No, I don't know that there -- I don't know how to  
answer 5 that question.  
6 Q. Is it your policy to demand privileged information?  
7 THE COURT: Counsel, she says she does not know.  
8 MR. KORESKO: Okay.  
9 THE COURT: Now, you have three minutes to conclude  
10 this examination of this witness.  
11 BY MR. KORESKO:  
12 Q. Exactly where in the trust document does it provide that  
13 expenditures cannot be made in connection with tax matters  
14 relating to the trust or its beneficiaries?  
15 A. I don't know where it's at in the trust document.  
That's 16 our policy to review that, and we did not feel that it was an  
17 allowable expense.  
18 Q. You didn't feel, but you can't cite to a particular  
19 provision that prevents it, correct?  
20 A. No, I don't have the policy memorized, I'm sorry.  
21 Q. Well, what about the document, ma'am. What about the  
22 document? Doesn't the document provide for a specific power  
23 of attorney for the Koresko Law Firm or John Koresko,  
24 personally, relating to tax and Department of Labor matters?  
25 Don't the documents provide for that?

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Robin Murray - Cross-Examination

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1 A. I don't recall that.

2 MR. NIEMAN: Your Honor, I --

3 THE COURT: Counsel --

4 MR. NIEMAN: -- I didn't fully understand the  
5 question, but I think it's a mischaracterization of what the  
6 documents say, and I think it gets back to this whole issue

we

7 were talking about where we've never seen this alleged  
8 amendment.

9 THE COURT: Sustained on that basis.

10 MR. KORESKO: Your Honor, I'm not referring to the  
11 amendment. I'm referring to the document that she testified  
12 was in her possession.

she

13 THE COURT: And she's testified consistently that

14 doesn't have it before her and she doesn't know  
independently.

thank

15 MR. KORESKO: She doesn't know in -- all right,

16 you.

17 BY MR. KORESKO:

18 Q. How many payments relating to income tax matters were  
19 made out of trust funds prior to your imposition of this new  
20 requirement?

21 A. Since F&M took over the account, is that what you're  
22 asking?

23 Q. No.

24 A. No, prior to that?

25 Q. Even prior to that, yes.

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- 1 A. I have no idea.
- 2 Q. What about since F&M took over the account?
- 3 A. Two? What are you talking -- all payments or what? I'm
- 4 sorry, could you please clarify that?
- 5 Q. Oh, which payments did you not deny?
- 6 A. We denied four payments.
- 7 Q. Right, and how many payments were paid before that?
- 8 A. We pay payments every week.
- 9 Q. Every week. And the new policy evolved at the direction
- 10 of your lawyers?
- 11 A. No, it's our policy in our department to review all
- 12 distributions being paid from accounts.
- 13 Q. What's the difference between a distribution, a benefit,
- 14 and a trust expenditure for fees?
- 15 A. When I say distribution, that's just meaning that that's
- 16 a payment going out of the account. I --
- 17 Q. Aren't they governed by different standards?
- 18 A. Yes.
- 19 Q. So in the event that the expenditures were actually
- 20 allowed plan benefits --
- 21 A. All three of those, is that what you're saying?
- 22 Q. No, the expenditures that were requested were allowed
- 23 plan benefits, you don't have a policy with respect to plan
- 24 benefits, correct?
- 25 A. I don't know.

7-17-09 Hearing

- 1 Q. Who does Larry Townsend work for?
- 2 A. PennMont.
- 3 Q. How do you know that?
- 4 A. Because his correspondence that I've received says that
- 5 in his --
- 6 Q. It says PennMont dot com. Isn't that just an e-mail
- 7 address?
- 8 A. Yes.
- 9 Q. But you don't know exactly who he works for, do you?
- 10 A. No.
- 11 Q. Who does Gene Bonnie work for?
- 12 A. Same company.
- 13 THE COURT: I'm sorry?
- 14 THE WITNESS: Same company.
- 15 Q. PennMont?
- 16 A. Yes.
- 17 Q. Did she ever -- how do you know that?
- 18 A. Same reason, her correspondence.
- 19 Q. She used a PennMont dot com e-mail address?
- 20 A. Yes.
- 21 Q. Actually, on Exhibit 3, if you'd like to pull that, she
- 22 uses a Koresko Law dot com e-mail address.
- 23 A. Aren't both companies connected in some way?
- 24 Q. I'm afraid that I don't have to answer that question.
- 25 You made an assumption, didn't you, ma'am?

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Robin Murray - Cross-Examination

- 1 A. No.
- 2 Q. Gene Bonnie told you I am employed by PennMont Benefit

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3 Services?

4 A. I've not spoken with Gene Bonnie.

5 Q. Then how do you know who she works for?

6 MS. HENRY: Objection.

7 MR. NIEMAN: Objection, I don't think there was a  
8 question.

9 THE COURT: Sustained.

10 BY MR. KORESKO:

11 Q. Just to be clear, why don't you tell me the difference  
12 between a plan and a trust?

13 MR. NIEMAN: Objection, Your Honor, that --

14 THE COURT: sustained. Anything further, Mr.  
15 Koresko?

16 Q. Are there any material deviations between the provisions  
17 of a REAL VEBA trust and the single employer welfare benefit  
18 trust?

19 MR. NIEMAN: Your Honor, I don't -- relevance. I  
20 don't see the relevance of this line of questioning.

21 THE COURT: The objection is sustained.

22 MR. KORESKO: Your Honor, I'm simply trying to point  
23 out that there are some rather convenient recollections with  
24 respect to documents, and when I asked for specifics, it  
25 seems that we get the I don't know.

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Robin Murray - Cross-Examination

1 THE COURT: The issues before this Court are finite  
2 and exact. There has been direct examination of this

witness;



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witness 3 there has been cross-examination of this witness. The

4 examination has concluded.

5 THE WITNESS: Thank you.

6 THE COURT: You may step down.

7 THE WITNESS: Thank you.

8 THE COURT: You may call your next witness.

9 MS. HENRY: The Secretary calls Drake Nicholas.

10 GOVERNMENT WITNESS, DRAKE NICHOLAS, SWORN

11 THE CLERK: Please state your full name, spell your

12 last name for the record?

13 THE WITNESS: Drake D. Nicholas, N-I-C-H-O-L-A-S.

14 MR. KORESKO: Your Honor, may I have an offer of

15 proof, please, as to why --

16 THE COURT: Surely.

17 MR. KORESKO: -- is being --

18 THE COURT: Surely. Go right ahead, please.

19 MS. HENRY: There has been testimony from Ms. Murray

20 regarding advice from counsel. Mr. Nicholas is the counsel

21 who provided such advice. We will ask only about that advice

22 that was provided in response to those questions. There are

23 also --

24 THE COURT: You may proceed.

gave 25 MR. KORESKO: Your Honor, I'll stipulate that he

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Robin Murray - Cross-Examination

1 the advice and I'll stipulate that she got it from him.

2 THE COURT: Do you accept that stipulation?

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3 MS. HENRY: We would ask a basis of that advice and  
4 whether that was discussed with Ms. Murray.

5 MR. KORESKO: Mr. Nicholas' --

6 THE COURT: No, no, just a moment. Would you accept  
7 that stipulation?

8 MS. HENRY: No, I'm sorry, Your Honor.

9 THE COURT: You may proceed, then. Thank you.

10 DIRECT EXAMINATION

11 BY MS. HENRY:

12 Q. Mr. Nicholas, by whom are you employed?

13 A. I'm an attorney with Rhoads & Sinon, Harrisburg Law  
Firm.

14 Q. And is F&M or did there come a time when F&M Trust  
became

15 one of your clients?

16 A. Yes, F&M has been a client of our firm for quite some  
17 period of time.

18 Q. But you have been in the courtroom and heard Ms. Murray  
19 report about -- or testify about conversations with counsel  
20 with regard to tax issues, is that correct?

21 A. That's correct.

22 Q. Are you the counsel from F&M Trust who was asked to look  
23 over its documents and determine these tax issues?

24 A. Yes, I was.

25 Q. I am also going to show you some documents, and the  
first

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Mr. Drake Nicholas - Direct Examination

1 document we will mark as Government Exhibit 17.

2 MS. HENRY: May I approach?

7-17-09 Hearing

3 THE COURT: Yes.

4 Q. Government Exhibit 17 is a letter addressed to yourself  
5 from the letterhead of the Koresko Law Firm, is that correct?

6 A. That's correct.

7 Q. Have you seen this document?

8 A. I have.

9 Q. Had you seen this document upon its mailing to you?

10 A. Yes, I did.

11 Q. What did you do after seeing this document?

12 A. Upon review of this document, we took into consideration

13 the information provided by, I believe this was Ms. Bonnie  
who

14 authored this letter. This letter was provided as background

15 to information that was requested by our client previously  
16 which was asking for substantiation and explanation of these  
17 expenses that were being requested.

18 Q. And by the expenses that are being requested, what are  
19 you referring to?

20 A. There was a request for a disbursement to the Koresko  
Law

21 Firm for, I believe, approximately 85,000 dollars. There was

22 a request for an expenditure -- a second one to Mr. Koresko  
23 for about 1500 dollars. And I think in between that period  
of

24 time there was a request for a disbursement to a law firm --  
25 the Gilbert Law Firm, I believe their name is, pertaining --

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Mr. Drake Nicholas - Direct Examination

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1 all the period pertained to the tax litigation with these --

2 with the VEBA plan.

3 Q. And when you say the tax litigation with this VEBA plan,

4 what did you learn about the tax litigation with this VEBA

5 plan?

6 A. We were provided with background information that a

7 number of these employers have been in a long time dispute

8 with the Internal Revenue Service concerning tax  
deductibility

9 of these plans. And that there is a current case, I believe,

10 in District Court of Georgia, which the issue of tax

11 deductibility for contributions to this plan is one of the

12 issues.

13 Q. And when you say the tax deductibility of the

14 contributions to the plan, what contribution to the plan?

15 A. That would be the employer's contribution to the plan.

16 Q. What was your response, if any, to this letter of June

17 17, 2009?

18 A. We were -- there was an initial letter that was sent, I

19 don't have it in front of me so I don't know all the date

20 sequence. But the response was made with respect to these

21 after consulting with our client. I forwarded a letter

22 directly to -- I believe it was Ms. Bonnie at that time,

23 indicating that we had consulted with our clients and advised

24 them that we do not believe these were appropriate expenses  
of

25 a plan because they were settler related. They're related to

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1 expenses being incurred by the employer's sponsors to these  
2 plans, and these expenses were not associated with plan  
3 participants, beneficiaries or any way related to the  
4 administration of the plan and trust of which our client is  
5 the trustee of that trust.

6 Q. In your discussions with the personnel from F&M Trust --

7 and let me ask you, was Ms. Murray with those discussions?

8 A. Yes. I've been in many discussions with Ms. Murray.

9 Q. Did you communicate that with her?

10 MR. KORESKO: Objection, Your Honor, that is asking  
11 for attorney-client privileged communication.

12 THE COURT: Sustained.

13 MR. KORESKO: Your Honor, there is no  
attorney-client

14 privilege in a fiduciary discussion. Again, I refer you to  
15 the research that I gave to the Court.

16 THE COURT: Let me hear from counsel.

17 MR. NEIMAN: Your Honor, I don't believe and I  
wasn't

18 prepared with cases and cites here today. But I don't  
believe

19 that the Third Circuit specifically adopted fiduciary  
20 exclusion. If I'm not mistaken the Third Circuit is  
21 specifically inclined to adopt fiduciary exclusion.

22 In addition to that, that fiduciary exclusion only  
23 applies to communications that relate to fiduciaries of the  
24 trust. Here, this was a communication between Mr. Nicholas  
25 and his actual client in terms of what they should do in  
terms

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1 of their own responsibilities relating to the situation.

2 THE COURT: Mr. Koresko, that's how I see the issue.

3 MR. KORESKO: I believe that the predicate to Ms.

4 Murray's testimony and Mr. Nicholas' involvement here related

5 to the administration of the trust. I don't understand where

The

6 the exclusion exists. They claim that they're a trustee.

7 fiduciary exception as articulated by the Third Circuit in

8 Wachtel v. Health Net. And, again, Your Honor, I apologize.

9 I didn't get this issue until last night.

10 THE COURT: I know.

to

11 MR. KORESKO: It's a little bit unfair, of course,

12 ask you to rule off the cuff in all this. And that's perhaps

to

13 why -- if you make a ruling against use we lost the ability

14 cross-examine Mr. Nicholas, or to have Mr. Nicholas give

15 relevant information to the hearing -- to the people that are

16 here including this Court.

17 The fiduciary exception provides that communications

18 between attorneys and clients that are fiduciaries and they

19 claim that --

20 THE COURT: Counsel, this is what I'm going to do.

21 I'm going to allow it, you have an exception, and it will be

22 subject to being stricken from the record upon review by the

23 Court. Go ahead. Thank you.

24 BY MS. HENRY:

25 A. Can we have the question reasked because my memory

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Mr. Drake Nicholas - Direct Examination

1 is not that good?

2 Q. As much as my memory will allow. With regard to the  
3 settler function and tax issue, if any, that you had with Ms.

4 Murray?

5 A. They were generally discussions with our client, with  
6 Murray, that the extent -- or there were two issues. One was  
7 the documentation to be provided regarding payment of the  
8 expense -- requested expense. And then separate aside from  
9 that was what did these fees and expense relate to. And our  
10 discussions were, obviously, they have a fiduciary position  
11 and a role to play in this to safeguard the plain assets.

And

12 were these appropriate expense to be paid.

13 THE COURT: Based upon Ms. Murray's earlier  
14 testimony and the testimony of this witness, the objection is  
15 overruled.

16 You may continue.

17 Now, counsel, we're going to go to about 12:30, so  
18 that everyone kind of knows where we are here. And we'll  
19 recess at 12:30.

20 MS. HENRY: Hope to complete by 12:30.

21 BY MS. HENRY:

22 Q. And did you advise Ms. Murray, so advise, PennMont about  
23 the decision to not pay these requests or payments with  
regard to the tax litigation?

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24 A. Yes, we did.

25 Q. I show you what is marked as Exhibit 10.

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Mr. Drake Nicholas - Direct Examination

1 (Pause)

2 Q. Do you recognize Government Exhibit 10?

3 A. I do.

Government

4 Q. And is that your signature on the last page of

5 Exhibit 10?

6 A. It is.

7 Q. Did you send this letter on July 6, 2009?

8 A. Yes, I did.

9 Q. What was the purpose of sending this letter?

respect

10 A. The purpose of this letter was to make clear with

11 to prior correspondences that were going back and forth that

12 we had advised our client or advised our client that these

13 expense -- we did not believe these were appropriate expenses

14 to be paid out of a trust and to make a further request for

15 additional plan information so that our client could properly

16 do its job.

17 Q. Had you --

18 THE COURT: Excuse me one second. May I inquire --

covered

19 sir, is it your position as counsel that this trust is

20 by ERISA?

21 THE WITNESS: It is my opinion, Your Honor, that it

22 is covered by ERISA.

23 THE COURT: You may continue.



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24 BY MS. HENRY:

25 Q. Have you been involved previously in directing or

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Mr. Drake Nicholas - Direct Examination

1 advising your client to request documentation from PennMont?

2 A. We had earlier discussions, yes.

3 Q. And what was --

4 THE COURT: Now, I apologize for interrupting, but I  
5 am also trying to cut to the chase here, counsel. And I'm  
6 going to ask one more question and I'll be quiet for a second  
7 or two.

8 Sir, you've not been sequestered; obviously you've  
9 been in the room and heard testimony by reason of inquiry by  
10 counsel. Earlier, during I believe Ms. Murray's testimony,  
11 she indicated as a concession to Mr. Koresko's inquiry, that  
12 PennMont can fire F&M "for any reason or for no reason." Is  
13 that correct?

14 THE WITNESS: That was correct, Your Honor, that's  
15 the way the document reads.

16 MR. KORESKO: Your Honor, at this point --

17 THE COURT: Yes, sir.

18 MR. KORESKO: -- I would move -- I would move that  
19 Mr. Nicholas' admission and Ms. Murray's admission constitute  
20 complete bar to the relief that's requested by the Department  
21 of Labor. Because, Your Honor --

22 THE COURT: We will cross that bridge when we come

to

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23 it.

24 MR. KORESKO: Okay.

25 THE COURT: Thank you very much.

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Mr. Drake Nicholas - Direct Examination

1 MR. KORESKO: I would just ask you, maybe at the  
2 break, as your clerk to pull Kennedy v. The Administrator of  
3 the DuPont supplemental income plan decided in February of  
4 2009, as to the specific instructions of the Supreme Court

for

5 the application of the planned documents as read.

6 THE COURT: Counsel, why do you think I've been  
7 asking the questions.

8 MR. KORESKO: Okay.

9 THE COURT: Now, I'll get to that bridge when I get  
10 to it. I'll cross that bridge when I come to it.

11 MR. KORESKO: Okay.

12 THE COURT: Now -- all right, thank you. You may  
13 continue.

14 BY MS. HENRY:

15 Q. I believe you had started to say you had communicated  
16 certain documents should be provided. Which documentation  
17 were you asking -- or advising that your client request?

18 A. We were -- the discussions were we were requesting our  
19 client personal to the policy which has been over and over  
20 again, the correct one, is fiduciary with respect to a number  
21 of benefit plans. It receives request each week to pay out  
22 numerous benefits. Our client was requesting copies of  
23 pertinent plan documents adopted by each of these separate

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24 employers that were participating in this program. There are  
25 various different types of benefits that are being paid to

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Mr. Drake Nicholas - Direct Examination

1 these trust assets, whether they are life insurance benefits.  
2 Life insurance premiums being paid on death benefits,  
3 education benefits -- the third one offhand I can't remember.

4 But there are various different benefits. One of the things  
5 our client wanted to do to confirm -- similar to the whole  
6 concept of before it pays expense to make sure it's a  
7 reasonable expense, is when it's wiring monies or cutting a  
8 check to pay a certain benefit, wants to be assured that it

is

9 paying insurance premium with respect to a certain employer  
10 that that employer is actually providing a death benefit to  
11 its employees. Our client has not way of substantiating the  
12 validity of the benefits being paid. Yes, it's supposed to  
13 take direction from the plan administrator, but it is also a  
14 fiduciary, nevertheless, and it has a fiduciary role and  
15 responsibility to make sure that benefits are being paid  
16 properly.

you

17 Q. And the documents that you requested were they -- did  
18 advise your client that they were necessary in order for them  
19 to properly perform that function you just testified to?

20 A. I advised them of that, but I didn't need to advise them  
21 of that, they already knew that.

22 THE COURT: Again, I apologize for the interruption.  
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23 But at what point in time, if you recall, were you "fired" by

24 Mr. Koresko?

25 THE WITNESS: Well, there are two e-mails, Your

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Mr. Drake Nicholas - Direct Examination

1 Honor, that Mr. Koresko forwarded, and I don't have them in  
2 front of me. They may have been exhibits that were entered  
3 already, they may not have. I don't know.

4 MS. HENRY: I do not mean to interrupt, Your Honor,  
5 but there is an e-mail which has been marked as Exhibit 11,  
6 which may refresh Mr. Nicholas.

7 THE COURT: All right. You may approach if you  
wish.

8 Thank you.

9 (Pause)

10 THE WITNESS: Counsel, can you repeat what you're  
11 asking me?

12 MS. HENRY: Well, I believe it was the Court's  
13 question.

14 THE WITNESS: Oh, I'm sorry.

15 THE COURT: Sir, has the document Exhibit 11  
16 refreshed your recollection?

17 THE WITNESS: It has.

18 THE COURT: Okay. Will you set that aside now, and  
19 do you recall the date when you were "fired" by Mr. Koresko?

20 THE WITNESS: That would be July 6th, Your Honor.

21 THE COURT: Of what year?

22 THE WITNESS: 2009.

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23 THE COURT: Based upon that and as counsel how is it  
24 that your entity is still trustee?

25 THE WITNESS: Well, Your Honor, has our client been

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Mr. Drake Nicholas - Direct Examination

1 notified by the plan administrator through Mr. Koresko that  
2 they have been removed? Yes. There is a provision in the  
3 trust document that sets forth that there's a ninety-day  
4 notice -- ninety days prior to the notice, prior to the  
5 effective removal of the trustee.

6 THE COURT: Are we in that ninety-day period right  
7 now?

8 THE WITNESS: We are.

9 THE COURT: All right. Thank you very much. You may  
10 continue.

11 BY MS. HENRY:

12 Q. Since I have shown you Exhibit 11 do you recognize that  
13 document, Mr. Nicholas? You can bring it back in front of  
14 you.

15 A. Yes, I do.

16 Q. What is that document?

17 A. It is an e-mail that was forwarded by Mr. Koresko to me.

18 As I recall within about an hour or so after I sent a letter  
19 to Mr. Koresko stating our client's position.

20 Q. And what did Mr. Koresko communicate in that e-mail?

21 A. I would have to take a moment to read it.

22 Q. I don't want all, I just want the basis. Is it what you

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23 had to testify to to the Court?

24 A. Yes, your client is removed.

25 Q. Did he give you any directions as to where the money in

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Mr. Drake Nicholas - Direct Examination

1 the trust should be transferred?

2 A. Yes. I believe he's indicated the funds should be  
3 transferred to Penn Public Trust. But I'd have to read the

e-

4 mail again to --

5 THE COURT: I'm going to give you all the time you  
6 need to read that because we're going to recess at this point

7 in time. It's 12:25. We will reconvene this afternoon at  
8 1:45 promptly. Thank you very much.

9 THE WITNESS: Thank you.

is

10 THE COURT: Now, to the extent that there -- there

11 a witness on the witness stand, there are potentially other  
12 witnesses, the Court directs an order of sequestration be  
13 imposed. Counsel, do not discussion your testimony with  
14 anyone else other than -- and actually you shouldn't be at  
15 this point and time even discussing it with counsel.

16 Thank you very much.

17 MR. KORESKO: Your Honor, may I ask one question?

18 THE COURT: Yes, sir.

was

19 MR. KORESKO: We weren't given a witness list who  
20 going to testify.

21 THE COURT: Please give that to counsel. And  
22 reciprocate as well, if you choose to call.

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23 MR. KORESKO: We're going to call two people, Your  
24 Honor.  
25 THE COURT: Again, exchange it. Thank you. 1:45.

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Mr. Drake Nicholas - Direct Examination

1 (Recess from 12:27 p.m. until 1:50 p.m.)  
2 THE COURT: Counsel, may I ask for your indulgence  
3 for just a moment, please?  
4 Sir, would you state your name again for the record.  
5 THE WITNESS: Drake D. Nicholas.  
6 THE COURT: Mr. Nicholas, as counsel to F&M, if this  
7 Court does not issue an order today for the duration of the  
8 period prior to the ninetieth day, if there were requests  
9 identical to the ones that had been denied up to this point,  
10 would you continue to deny those requests?  
11 THE WITNESS: We would, Your Honor.  
12 THE COURT: Thank you.  
13 MS. HENRY: One question.  
14 BY MS. HENRY:  
15 Q. Mr. Nicholas, do you have an area of concentration or  
16 specialty in your practice?  
17 A. Yes. I specialize in several areas, but in particular,  
18 ERISA.  
19 MS. HENRY: No further questions.  
20 THE COURT: Mr. Koresko?  
21 MS. HENRY: I'm sorry, I apologize. We do need to  
22 move in Government Exhibits 10, 11 and 17.  
23 THE COURT: Any objection?

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24 MR. KORESKO: My only objection is to Gram H.

25 (indiscernible)?

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Mr. Drake Nicholas - Direct Examination

1 MS. HENRY: And I --

2 THE COURT: Would you say that again?

3 MR. KORESKO: Gram H. (indiscernible) objection.

And

4 continuing one from -- I'm not allowed to have continuing  
5 objections. So I'll restate it. To the extent that these  
6 documents were turned over to the government as a result of a  
7 discovery requests, at which F&M Trust beneficiaries were not  
8 made aware, we allege that Rosen Simon had a derivative  
9 fiduciary responsibility not to turn over any of them.  
10 That they had to ask first before turning over private  
11 identifying -- anything that had private identifying  
12 information in it, and they didn't do it. So that objection  
13 contains, and that's really restating what I stated --

14 THE COURT: All right. Thank you very much. The  
15 objection is overruled, exception is noted.

16 MS. HENRY: One further item, Your Honor.

17 THE COURT: Certainly.

18 MS. HENRY: I believe I may have moved in 15 twice,  
19 rather than moved in 16. So to the extent I have not already  
20 moved Government Exhibit 16 into evidence, we do so now.

21 THE COURT: Thank you very much.

that

22 I'm sorry, sir, I do have another question. And

23 is if requested by Mr. Koresko, would you turn over the



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entire

24 trust before the ninetieth day?

question

25 THE WITNESS: Your Honor, that's a difficult

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Mr. Drake Nicholas - Direct Examination

conduct

1 to answer. But I believe at this point we would advise our

2 client that it has a fiduciary duty in the standard of

the

3 of care that, no, we would not. Based upon concerns about

4 plan and it's operation at this point, we would not so advise

5 our client to turn over the assets earlier than ninety days.

6 THE COURT: Who would be in a position of authority

7 at the trust to not follow your advice and turn over any

8 monies?

not

9 THE WITNESS: We advise our clients as counsel. I

10 mean, obviously, our clients can overrule any or choose to

would

11 accept or ignore any advice we provide. So whether that

12 be the head of the trust department or up higher admin trust,

to

13 that would be their prerogative to do, since we are counsel

do

14 the bank but not in a position of making a determination to

15 that.

16 THE COURT: Thank you.

17 CROSS-EXAMINATION

18 BY MR. KORESKO:

19 Q. Mr. Nicholas, I want to get clear something that's still

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right?

20 unclear to me. You advised F&M not to pay any request,

21 A. We advised F&M not to pay certain expenses that were  
22 submitted that we do not believe to be appropriate plan  
23 expenses.

24 Q. And what, particularly, did you advise are inappropriate  
25 plan expenses?

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Mr. Drake Nicholas - Cross-Examination

I

1 A. Payment to your law firm, payment to attorneys; Gilbert  
2 believe is the name of the law firm. And I believe the costs  
3 from Caplin & Drysdale.

4 Q. So the payments to Gates' firm are okay?

5 A. No.

6 Q. And the payment to Community Trust Company FM, that's  
7 fine?

8 A. They're serving in a fiduciary capacity, yes.

9 Q. They didn't put forward any documents to justify their  
10 payments, did they?

and

11 A. Actually, that whole sequence of how F&M and Fire CTC  
12 operated in terms of being a trustee was all run by PennMont  
13 that provided the direction on a monthly basis, I believe,  
14 itemized each employer with each itemized fee that F&M should  
15 charge to the trust. So they followed the direction of  
16 PennMont with respect to that.

17 Q. So it's okay to follow PennMont's direction for a  
18 professional expense to benefit your client, but not a

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19 professional expense that you are in conflict with in a  
20 litigation, that's correct, right?

21 A. No, I don't agree with your statement.

22 Q. You're an adversary in litigation of PennMont Benefit  
23 Services, correct?

24 A. Not at this point we're not.

because 25 Q. You have in California, and tell me if I'm wrong,

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Mr. Drake Nicholas - Cross-Examination

of 1 I just got the pleadings last week. Mr. Moniak, by the way,  
2 has stated that -- on the record that they now contest none  
3 the plaintiff's allegations in a lawsuit against PennMont and  
4 the trusts in the District of California, are you familiar  
5 with the Data Link case?

6 A. Yes.

7 MS. HENRY: Objection, relevance.

8 MR. KORESKO: The relevance is -- I'm sorry.

9 THE COURT: Now you may give me your proffer.

impairment 10 MR. KORESKO: The relevance is to show the  
11 of the fiduciary relationship, the conflicts of interest that  
12 are now resonant in the context of the arrangement, and to  
13 show that -- look, further to emphasize the probability of  
14 success on the merits and the equities that are involved in  
15 this case. Your Honor --

16 THE COURT: Is the California case a state case?

17 MR. KORESKO: No, it's federal district.

18 THE COURT: Federal case.

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19 MR. KORESKO: As a matter of fact, it was filed here  
20 originally, it's on appeal to the Third Circuit. And it was  
21 refiled in the Central District of California. We will -- we  
22 are in the process of preparing a 12(b)(1) response. But  
23 there's an exclusive venue and jurisdiction clause in the  
24 trust document vesting exclusive venue here, in the Eastern  
25 District, that we believe Data Link will be returned here.

of

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Mr. Drake Nicholas - Cross-Examination

1 course, I can't speak for the judge.

2 THE COURT: Good thing. To the extent that you have  
3 inquired to this witness a question regarding the California  
4 case, how is that relevant to this inquiry?

5 MR. KORESKO: It's the same trust. A similar issue  
6 to what has been presented as the reason why Community Trust  
7 F&M has to be --

8 THE COURT: Let me ask you this way, counsel.

9 MR. KORESKO: Of course.

10 THE COURT: Are you proffering that they have  
11 opposing positions on the same issue, or inconsistent issues  
12 on the same issue?

13 MR. KORESKO: Yes.

14 THE COURT: All right. Objection overruled. You  
15 answer the question.

16 BY MR. KORESKO:

17 A. Could you restate -- could you provide me with the

may

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18 question again, please?

19 Q. Isn't it true that you've agreed not to contest the  
20 plaintiff's claims in the Data Link case in the Central  
21 District of California?

And

22 A. We are not contesting those claims, that is correct.

23 the reason we're not contesting those claims is for two  
24 reasons. One, our client is a directive trustee. Our client  
25 takes no position with respect to whether it was properly

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Mr. Drake Nicholas - Cross-Examination

1 moved or not. Secondly, the very trust that was new drafted  
2 provides that the trustee need not get directly involved in  
3 litigation, it can allow those matters to be decided by the  
4 Court.

5 Q. What are you doing here?

6 A. I was subpoenaed.

7 THE COURT: Excuse me. That's true. Counsel --

8 MR. KORESKO: I'm sorry, I withdraw that comment,  
9 Your Honor. I'm sorry if it -- I'll put it in terms of a  
10 question.

11 THE COURT: Thank you.

12 BY MR. KORESKO:

13 Q. Mr. Nicholas, what makes the California case different  
14 from this case in terms of your desire to be in front of a  
15 Judge?

16 MR. NEIMAN: Your Honor, I'm going to --

17 THE COURT: Sustained.

18 Q. Mr. Nicholas, did you have a duty to get involved in the

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19 California case at all?

20 A. Did we have a duty to get involved? We were named  
21 defendants, so, obviously, we were involved in that case.

22 Q. And you got yourself released, right?

23 A. Yes.

24 Q. You didn't get any of the beneficiaries released or the  
25 trust corpus released, correct?

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Mr. Drake Nicholas - Cross-Examination

F&M  
1 A. It's not a petition to get other parties released. The  
2 issue at hand in the Nestea case is a dispute over whether  
3 as to F&M is being properly terminated or not. That is not  
4 our position to decide one way or another. F&M is an  
5 appointed fiduciary. And, again, pursuant to the provisions  
6 of the trust which you drafted, F&M has no obligation or  
7 responsibility to contest those claims. It can -- if you can  
8 provide me with a copy of Section 8.7, I believe of your  
9 trust, counsel why don't you read the language that you  
wrote.

10 THE COURT: Excuse me. The way this works is the  
11 train moves and not the station.

12 THE WITNESS: I understand, Your Honor.

13 THE COURT: He gets to ask the questions. Go on.

14 BY MR. KORESKO:

15 Q. Quite elucidating, Mr. Nicholas.

16 THE COURT: No comment, counsel. Just go ahead.

17 Q. So if I take your testimony you know that my firm were  
18 the draftsmen of the trust, correct?

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19 A. Yes, I believe that you stated that in prior documents.

20 I can't point to which one.

21 Q. So you believe that statement by Mr. Koresko when he  
22 wrote to you, right?

23 A. If you wrote that to me, yes.

24 Q. And you didn't believe the other statements as to the  
25 authority under which the firm was acting?

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Mr. Drake Nicholas - Cross-Examination

1 A. No. I put those into two different pots. I also cite  
2 the very language that you have in your trust under standard  
3 of conduct which I pointed out to you in my letter of July  
4 6th.

5 Q. Well, a standard of care differs from practitioner to  
6 practitioner, doesn't it, Mr. Nicholas?

7 THE COURT: Excuse me, care or conduct?

8 MR. KORESKO: Conduct, I'm sorry.

9 Q. Standard of conduct. Your standard of conduct is  
10 obviously different than CTC's, correct?

11 A. Yes.

12 Q. Now, are you telling me that PennMont didn't have the  
13 right to rely on the continuation of a prior ten-year  
standard  
14 of conduct?

15 A. No, you did not have a right to rely on a standard of  
16 conduct by CTC, which is a separate company serving as  
17 separate fiduciary capacity. And then CTC is acquired by a  
18 totally different company who has different policies and  
19 standards and believes however those policies are, their

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20 administer fiduciary counselors may be different than CTC  
21 administers will.

22 Q. I didn't ask that question. It was a merger wasn't it,  
23 correct? Isn't that correct, Mr. Nicholas, it was a merger?

24 A. I didn't handle the corporate transaction but they were  
25 successor by operation of law, yes.

a

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Mr. Drake Nicholas - Cross-Examination

1 Q. A successor by operation of law means in a merger  
2 setting. which, by the way, I would ask Your Honor to take  
3 judicial notice of the Pennsylvania corporate documentation  
4 and the admissions in the Data Link case that, in fact, CTC  
5 doesn't exist anymore by merger. You don't dispute that Mr.  
6 Moniak has said that in his pleadings, do you?

7 A. CTC, the company, no longer exists because it was merged  
8 by operation of law into F&M, which succeeds all the assets  
9 and liabilities of CTC.

10 Q. Exactly. And it's contractual obligations, right?

11 A. Yes.

contractual

12 Q. And the course of dealing in context with the  
13 obligation?

14 A. Yes.

15 Q. So why did you change the course of dealing?

16 A. Because we are not CTC. We didn't represent CTC, we  
17 represent F&M.

18 Q. But did you direct your clients to give notice to  
19 PennMont or any party associated with REAL VEBA or SEWBT, of  
20 the change of conduct? The change or the course of conduct?



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- 21 A. Yes. We have correspondence with you, Bonnie, and  
22 e-mails with you and our office.  
23 Q. In May of this year, right?  
24 A. So be it.  
25 Q. But ten years and seven months that the course --

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Mr. Drake Nicholas - Cross-Examination

1 THE COURT: Counsel, you're being argumentative.  
2 Please, next question. We're going to stop this hearing  
3 pretty shortly.

4 MR. KORESKO: All right.

5 Q. Mr. Nicholas, you keep talking about fiduciary duties.  
6 In fact, isn't a directive trustee an agent, it's not a  
7 fiduciary, is it?

8 A. No, it is a fiduciary.

9 Q. Actually, Mr. Nicholas, are you familiar with luring a  
10 trustee's handbook, are you familiar with this volume, sir?

11 A. No, not that volume, I'm not.

12 MR. NEIMAN: Your Honor?

13 THE COURT: Yes, sir.

14 MR. NEIMAN: I don't know if he's questioning him

now

15 as an expert. We're starting to get into a round that we're  
16 not here for today.

17 THE COURT: It's a moot point. He said he's not  
18 familiar with the volume. So it doesn't matter.

19 MR. KORESKO: He gave two expert opinions already  
20 that Your Honor already asked about, and I'm afraid that if  
21 Your Honor is going to take into --

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22 THE COURT: I asked him a question as a witness on  
23 the witness stand. He was not qualified as an expert. I did  
24 not ask him a question as an expert.  
25 BY MR. KORESKO:

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Mr. Drake Nicholas - Cross-Examination

1 Q. Are you familiar with the Restatement Second of Agency, .

2 Mr. Nicholas?

3 MR. NIEMAN: Your Honor.

4 MS. HENRY: Objection.

5 THE COURT: Sustained.

6 Q. Mr. Nicholas, do you know what the standard is of an  
7 agent trustee as opposed to a trustee?

8 MR. NIEMAN: Same objection.

9 THE COURT: Sustained.

10 Q. Mr. Nicholas, are you offering any expert opinion here  
11 today?

12 MR. NIEMAN: I would object --

13 THE COURT: Sustained.

14 Q. Mr. Nicholas, what due diligence have you done on the  
15 structure of REAL VEBA and SEWBT to justify you in making the  
16 blanket statement that ERISA applies?

17 A. well, based upon the documents we've been able to  
18 we believe that there's a sufficient nexus between the trust  
19 and the number of adopting employers that maintain the  
20 welfare benefit plans that are associated with this trust.  
21 Q. But that's not the test, is it?

review,  
various

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22 A. You asked me what did I do to make that determination.

23 Q. But that's not the test --

24 MR. NIEMAN: Your Honor, objection again --

25 THE COURT: Sustained.

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Mr. Drake Nicholas - Cross-Examination

1 MR. NIEMAN: -- he factually testified and now --

2 THE COURT: Sustained. Sustained.

3 MR. NIEMAN: Thank you.

4 BY MR. KORESKO:

5 Q. What is the relationship among the adopting employers in

6 REAL VEBA?

7 A. Well, we don't know, because your firm, is failing --

8 Q. Thank you.

9 A. -- to provide the documents.

10 Q. Thank you. What is the relationship of the  
beneficiaries

11 in REAL VEBA?

12 A. Again, we don't have the documents --

13 MR. NIEMAN: Your Honor, objection.

14 THE COURT: Just a moment, please. Yes, sir?

15 MR. NIEMAN: Objection, Your Honor. We keep going  
16 over this. I mean, he's here as a fact witness to testify to

17 the facts as to why, what led up to the firing or the  
18 termination of F&M Trust. Now we're going into issues that  
19 are irrelevant to the proceedings today. They're asking for  
20 legal opinion that are well beyond the scope of a fact

witness

21 in this very limited proceeding that we're here for today.

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22 THE COURT: Counsel?

23 MR. KORESKO: Your Honor, one of the elements of  
this

24 proceeding is whether or not, under the trust arrangements

25 that exist, PennMont not only had an absolute basis to fire

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Mr. Drake Nicholas - Cross-Examination

1 F&M, but did so on the basis of cause. My questions to Mr.

2 Nicholas, I hope are --

3 THE COURT: Counsel, I don't think that's an issue  
at

4 all. I think one of the witnesses already testified, if you

5 say they're no longer there, no longer there. The only issue

6 that we talked about earlier was the ninety-day period of

7 time.

8 MR. KORESKO: Well, that's the next point that I'd

9 like to --

10 THE COURT: Let's --

11 MR. KORESKO: -- and I'm not going to go on much

12 farther.

13 THE COURT: -- cut to the chase, please.

14 MR. KORESKO: Okay.

15 BY MR. KORESKO:

16 Q. Mr. Nicholas, you said that PennMont expenses were a

17 settler function type of expense, right?

18 A. No, I did not say that.

19 Q. Who is the settler of REAL VEBA?

20 A. I did not say that PennMont's expenses -- PennMont never

21 submitted any expenses to our client.

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settler 22 Q. Oh, the law firm's expenses were in the nature of  
23 function expenses. Who was the settler of the plan?  
24 A. All the employers that are fighting all the tax  
25 litigation.

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Mr. Drake Nicholas - Cross-Examination

1 Q. How do you know that?  
2 A. We've been provided with some limited information about  
3 the various tax cases.  
4 Q. So you've determined on the basis of limited information  
5 that the employers are actually settlers?  
6 A. Yeah, an employer is the settler, yes.  
7 Q. Would it surprise you that the trust was not formed by  
8 those employers?  
9 A. I can't answer that, because I don't have all the  
10 documents to make that assessment.  
incomplete 11 Q. So you've made your statements on the basis of  
12 information, correct?  
13 A. On the basis that PennMont has not turned over all the  
14 documents, correct.  
15 Q. Isn't it true that plan surplus is not in anywhere in  
16 those documents, committed to the payment of death benefits?  
17 MR. NIEMAN: Your Honor, objection --  
18 MR. KORESKO: I'm sorry. Let me clarify the  
19 documents.  
20 Q. In the plan and trust documents, isn't it true that  
21 nowhere is plan surplus committed to the payment of benefits?

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22 MR. NIEMAN: Objection. Relevance?

23 MR. KORESKO: It's the crux of the case. The case  
is  
24 about the payment out of plan surplus of what are alleged to  
25 be improper expenses. If, Your Honor, the beneficiaries had

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Mr. Drake Nicholas - Cross-Examination

1 no reasonable expectation of receiving anything out of plan  
2 surplus, no one's been harmed. That kills jurisdiction of  
the  
3 Department of Labor under 502(a)(5) of ERISA, because under  
4 LaRue (ph.) the most recent Supreme Court decision on the  
5 topic, and under Hughes Aircraft, and under Lockheed and  
under  
6 Malia v. GE in the Third Circuit, and a hundred other cases,  
7 plan surplus is not a benefit and there's no expectation of  
8 it.

9 THE COURT: All right. The objection is overruled.

10 Go ahead.

11 A. I disagree with your assessment that this is plan  
12 surplus.

13 BY MR. KORESKO:

14 Q. I want to ask you a question --

15 A. -- these -- would you let me --

16 THE COURT: No. Allow him to answer.

17 A. These assets are being used to pay insurance benefits  
and  
18 various benefits from these various employer plans. There is  
19 no basis upon which to determine that there is surplus. As  
an

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20 ERISA attorney, what I view surplus to be is assets remaining  
21 in the trust after the satisfaction of all expen -- of all  
22 benefit liabilities, obligations of the plan and expenses.  
23 This plan is far from being -- from doing that. There are  
24 various insurance policies that are held under this plan. If  
25 for example, all of those insurance companies would go under

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Mr. Drake Nicholas - Cross-Examination

1 tomorrow, there still needs to be a funded benefit to these  
2 various employer plans. So the actual surplus that you refer  
3 to would need to be used to pay benefits --

4 THE COURT: Excuse me one second. Excuse me one  
5 second, sir. Is it then your position that that figure, if a  
6 surplus existed or did not exist, could only be identified at  
7 a point at the end of the existence of the trust?

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: All right.

10 BY MR. KORESKO:

11 Q. Well, actually, Mr. Nicholas, have you read the NEA case  
12 that just was issued by the DC Circuit on this particular  
13 issue?

14 MR. NIEMAN: Objection, Your Honor.

15 THE COURT: Sustained.

16 Q. Mr. Nicholas, are you aware that there are at least two  
17 circuits in the United States that have already held that  
18 demutualization proceeds are surplus -- allocated plan

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rights 19 surplus, and that welfare plan participants do not have

20 to them? Are you aware of that?

21 MS. HENRY: Objection.

22 MR. NIEMAN: Objection.

23 THE COURT: The objection is sustained. You might

here 24 want to put that in a brief, perhaps an argument, but not

25 questioning this witness now.

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Mr. Drake Nicholas - Cross-Examination

I'm 1 MR. KORESKO: Okay, Your Honor.

2 THE COURT: I want you to cut to the chase here.

3 going to give you a few more minutes to go with this witness.

4 BY MR. KORESKO:

5 Q. What particular provision of the plan document, Mr.

6 Nicholas, do you refer to in saying that PennMont does not

7 have the right to make an accounting classification under the

8 plan?

9 MR. NIEMAN: Objection. I don't believe he's

10 testified to that fact.

11 MR. KORESKO: I assumed that he was giving testimony

12 about the plan document itself. He made representations to

13 that effect. If I'm wrong, then maybe you'd clarify.

14 THE COURT: All right.

15 MR. NIEMAN: It was a characterization of testimony

16 that never took place. That's the --

17 THE COURT: Sustained. You may rephrase.



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18 BY MR. KORESKO:

19 Q. Mr. Nicholas, what if I told you that the plan document  
20 provided that PennMont had the absolute right to designate  
21 what was plan surplus, what was experience gain, and what was  
22 not?

23 A. Is that a question or a statement?

24 Q. What if I told you, would that change your answer?

25 A. Is it a question or a statement you're asking.

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Mr. Drake Nicholas - Cross-Examination

1 MS. HENRY: Objection. Not in evidence.

2 THE COURT: Sustained.

3 Q. Did you read in the trust document where PennMont has  
the ability to designate anything as surplus or experience gain?

5 A. No.

6 Q. Did you read in the trust document that in the event  
that there is no life insurance policy intended for the --

8 MR. KORESKO: I'm sorry. Let me restate.

9 Q. Did you read in the plan document that in the event  
there is no life insurance policy in place at the time of death,  
that no benefit is payable?

12 A. No, I haven't seen such a provision.

13 MR. KORESKO: That's all I have, Your Honor.

14 THE COURT: Very well, thank you.

15 MS. HENRY: The Secretary calls Jocelyn Diaz  
16 Sweeting.

17 THE COURT: Thank you, sir. You may step down.

7-17-09 Hearing

18 MS. HENRY: Ms. Jarquin will handle the examination  
19 of Mr. Sweeting.

20 THE COURT: Very well.

21 GOVERNMENT'S WITNESS, JOCELYN DIAZ SWEETING, SWORN

22 THE CLERK: State your full name and spell your last  
23 name for the record.

24 THE WITNESS: Jocelyn Diaz Sweeting,  
S-W-E-E-T-I-N-G.

25 THE COURT: You may proceed.

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Mr. Drake Nicholas - Cross-Examination

1 MS. JARQUIN: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. JARQUIN:

4 Q. Could you please state by whom you're employed?

5 A. The U.S. Department of Labor Employee Benefit Security  
6 Administration.

7 Q. And what is your current business address?

8 A. 170 South Independence Mall West, Philadelphia, PA.

9 Q. Investigator Sweeting, would you please state your  
10 current title?

11 A. I'm a senior investigator.

12 Q. And how long have you had that position?

13 A. I've been a senior investigator since 2008.

14 Q. And how long have you been with the Department of Labor?

15 A. Since June 2001.

16 Q. What did you do between 2001 and 2008 when you became a  
17 senior investigator?

18 A. I was an investigator in the regular capacity. I joined  
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19 the REAL VEBA investigative team in 2007.

20 Q. Could you describe generally for the Court what the job  
21 duties are of an investigator with the Department of Labor?

22 A. My duties include the enforcement of Title 1 of ERISA.

23 Q. You indicated that in 2007 you became assigned to the  
24 investigation of what we've been referring to here as the

REAL

25 VEBA and SEP?

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Ms. Jocelyn Sweeting - Direct Examination

1 A. Yes.

2 Q. And that's the investigation that resulted in the filing  
3 of the pending lawsuit?

4 A. Yes, it is.

5 Q. During the course of that investigation, did the  
6 department investigate welfare benefit plans administered by  
7 PennMont and the other defendants?

8 A. Yes, we did.

9 Q. Investigator Sweeting, were asked to prepare and execute  
10 a declaration in the pending TRO matter that we're here for?

11 A. Yes, I was.

12 Q. And are you aware that that was submitted as part of the  
13 documents in support of this TRO?

14 A. Yes, I am aware.

information

15 Q. I'd like you to describe the general types of

course

16 the department had available to it to review during the

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17 of the investigation of -- and for reference, I'll just refer  
18 to the investigation of the REAL VEBA -- the investigation  
you 19 just mentioned you were assigned to?  
20 A. During the course of the investigation we reviewed over  
21 300,000 pages of documents that included bank statements,  
22 invoices, correspondence, e-mails, census reports.  
23 Q. And as a result of that investigation, what did the  
24 department learn about the type of welfare benefit plans  
25 administered by the defendants?

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Ms. Jocelyn Sweeting - Direct Examination

1 MR. KORESKO: Objection. Calls for a legal  
2 conclusion, Your Honor. If she's going to make a factual  
3 statement that's fine, but if she's going to on and start  
4 making legal conclusions as a result -- that follow from the  
5 facts --  
6 THE COURT: Sustained.  
7 BY MS. JARQUIN:  
8 Q. As a result of the department's investigation, what did  
9 you learn about the plans administered by the defendants?  
that 10 A. What we were able to obtain during the investigation  
11 there were prototype death benefit plans that were being  
12 offered to various employers.  
13 Q. And how did employers establish these plans?  
14 A. Employers signed adoption agreements.  
15 Q. And were adoption agreements signed by individual  
16 employers?  
17 A. They were signed by individual employers, and the plans

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18 were in the name of those employers.

19 Q. Was there any information in these adoption agreements  
20 that set forth the qualifications for the type of employees  
21 who could participate in the plan?

22 A. The employers established the qualifications that their  
23 employees needed to meet in order to participate in their  
24 plan.

25 MR. KORESKO: Objection, Your Honor. May I ask for

a

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Ms. Jocelyn Sweeting - Direct Examination

1 clarification, please?

2 THE COURT: Yes, sir.

3 MR. KORESKO: Ms. Sweeting is testifying on the

basis

4 of documents that she saw, not on the basis of discussions  
5 with the persons who executed the documents.

6 THE COURT: Is that correct, ma'am?

7 THE WITNESS: Yes, sir, it is.

8 THE COURT: All right. Fine. The record shall so  
9 reflect.

10 MR. KORESKO: And Ms. Sweeting is testifying on the  
11 basis of -- if that's the case, I believe that we're entitled

12 to know, at this point, before any more questions are asked,  
13 what was the source -- where did these documents come from?

14 THE COURT: Counsel that's an appropriate objection.

15 would you lay a foundation, please?

16 MS. JARQUIN: Yes, Your Honor.

17 BY MS. JARQUIN:

7-17-09 Hearing

18 Q. Investigator Sweeting, where did you obtain the adoption  
19 agreements that you're referring to in your testimony?

20 A. During the course of the investigation we issued several  
21 subpoenas, some to banks, some to insurance companies, some  
to  
22 the defendants in the case. And the documents that I  
reviewed  
23 were produced from those subpoenas.

24 MR. KORESKO: And I object to Ms. Sweeting's  
25 testimony as being hearsay, Your Honor. She's testifying on

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Ms. Jocelyn Sweeting - Direct Examination

1 the basis of documents produced by third parties who are not  
2 here. Obviously she doesn't have the documents here for us  
to  
3 cross examine her on. It's a simple hearsay issue. They're  
4 not in business. There's no business record exception.  
5 There's no official government -- the government didn't  
6 produce the expense. There's absolutely nothing here that we  
7 can cross examine her on. We're just taking her opinion of  
8 what she read. I don't believe that she can give this kind  
of  
9 testimony and this kind of hearing.

10 THE COURT: Counsel?

11 MS. JARQUIN: Your Honor, I would like to follow up  
12 with further foundation of Investigator Sweeting as to the  
13 source of the adoption agreements, specifically from which  
14 party or from -- in response to which subpoena these adoption  
15 agreements were submitted to the department.

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16 THE COURT: Very well.

17 BY MS. JARQUIN:

18 Q. Investigator Sweeting, do you know from which subpoena  
19 these documents, these adoption agreements were received by  
20 the Department of Labor?

21 A. The department received a production for an answer to a  
22 subpoena on March 10, 2006 from PennMont.

23 Q. Thank you.

24 MS. JARQUIN: May I continue, Your Honor?

25 THE COURT: Counsel?

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Ms. Jocelyn Sweeting - Direct Examination

1 MR. KORESKO: Well, Your Honor, I would only ask the  
2 Court to take notice of the date, at this point.

3 THE COURT: I can't do that. Talk to me. What is  
4 me that you want me to see, counsel?

5 MR. KORESKO: There's a -- the ERISA guide views  
6 jurisdiction -- the statute of limitations as to jurisdiction.

7 She just testified that the documents received by the DOL and  
8 giving rise to this were produced on March the 10th, 2006.  
9 That's quite some time ago. And -- let me withdraw. I'll  
10 hold it for closing.

11 THE COURT: You may continue.

12 MS. JARQUIN: Thank you, Your Honor.

13 BY MR. JARQUIN:

14 Q. Ms. Sweeting, did these adoption agreements set forth  
the

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15 type and amount of benefits the individual plans' sponsors  
16 were establishing for their particular plans?

17 A. Yes it did.

18 MR. KORESKO: Objection, Your Honor. The word plan  
19 sponsor, plan --

20 THE COURT: Sustained.

21 MR. KORESKO: -- these are all legal conclusions.

22 THE COURT: Sustained.

23 BY MS. JARQUIN:

24 Q. Did these adoption agreements contain any information  
25 about the type or amount of benefits being offered?

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Ms. Jocelyn Sweeting - Direct Examination

1 A. Yes, they did.

2 Q. During the course of the department's investigation, did  
3 you learn anything about how persons would become  
participants 4 in these plans?

5 A. Participants specifically employees, would sign the  
6 participation agreements.

7 Q. And did they do anything other than signing  
participation 8 agreements? Did they do any other kind of filling out of  
9 forms?

10 A. The participation agreement would, in essence, bring  
them 11 into the plan. The employer would then establish a life  
12 insurance policy in their name. The employee was responsible  
13 for designating a beneficiary to that policy.

14 Q. During the course of the department's investigation, did  
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15 the department come into any information as to how the  
16 benefits were funded?  
17 A. They were funded through life insurance policies.  
18 Q. And do you know what type of life insurance policies  
they  
19 were? whose lives were being insured?  
20 A. The lives of the employees.  
21 Q. The employee participants?  
22 A. Yes.  
23 Q. And, Investigator Sweeting, during the course of the  
24 department's investigation, did you come upon any information  
25 as to whether there were any procedures in place for

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Ms. Jocelyn Sweeting - Direct Examination

1 participants to make claims?  
2 A. We found through reviewing documents that if a claim was  
3 made the employee or the employer would make the claim and  
4 PennMont would adjudicate those claims.  
5 Q. During the course of the department's investigation, did  
6 the department come to establish how many of the arrangements  
7 that you've just described were in existence?  
8 MR. KORESKO: Your Honor, I'm happy to stipulate to  
9 Ms. Sweeting's affidavit, rather than reading it here in  
10 court. Because all that's happening here right now is she's  
11 basically just rehashing what she said in a document that was  
12 prepared for her, probably. But I won't -- I'm going to

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13 stipulate that Ms. Sweeting will give the testimony that's in

14 her affidavit. And I don't think that she's --

15 THE COURT: Counsel, would you accept that offer?

16 MS. JARQUIN: With the understanding that she'd be  
17 released today and she wouldn't be further subject to  
18 examination, that would be fine. I would stipulate to that.

19 MR. KORESKO: Yeah. That's fine.

20 THE COURT: All right. Have a nice day.

21 THE WITNESS: Thank you.

22 MS. JARQUIN: Thank you.

23 MR. KORESKO: Again, my stipulation is that I agree  
24 that she did --

25 THE COURT: would you mark the affidavit as an

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Colloquy

1 exhibit number and offer it please?

2 MS. JARQUIN: The one thing I would like to do, Your

3 Honor, I was going to be introducing two documents through  
4 Investigator Sweeting; they were the documents that are  
5 attached to the declaration. I can just admit the

declaration

6 into evidence. The two documents are the two trust

agreements

7 we've been referring to. I have copies of her declaration; I

8 can just mark it and admit it, if all are in agreement.

9 MR. KORESKO: Your Honor, I have one objection  
10 because one of the documents, I don't believe, is the trust.

11 THE COURT: Review it and let me know.

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12 MS. JARQUIN: I could ask Ms. Sweeting to  
13 authenticate the documents, if you'd like. I will just, for  
14 the benefit of the Court, note that the document that is  
15 attached as Exhibit A to the declaration is not  
Bates-stamped.  
16 I have a duplicate of that with a Bates stamp of CTC's Bates  
17 stamp that shows how it came to us and what the numbers were.  
18 I can substitute that and have Ms. Sweeting authenticate how  
19 it came into the possession of the department.  
20 MR. KORESKO: So we're admitting A and B off of her  
21 declaration, is that correct?  
22 MS. JARQUIN: We'd like to -- we could admit the  
23 declaration as well as A and B, that would be fine.  
24 MR. KORESKO: That's fine.  
25 MS. JARQUIN: Thank you.

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Colloquy

1 THE COURT: Thank you very much.  
2 MS. JARQUIN: I'll mark that Exhibit -- Government  
3 Exhibit 18. Thank you, Your Honor.  
4 THE COURT: Thank you.  
5 MS. HENRY: The Secretary rests.  
6 THE COURT: All right.  
7 MR. KORESKO: Move for directed judgment, Your  
Honor,  
8 on the basis of the fact that they did not introduce the plan  
9 document in this case, that they allege as a plan. They only  
10 introduced the trust documents. The trust documents in this  
11 case are the arrangement which the Third Circuit already

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12 determined is not an ERISA plan. Adminiad (ph.) v. -- I'm  
13 sorry, Adminiad out of the Seventh Circuit; Donovan v.  
14 Dillingham out of the Eleventh Circuit; Taggart out of the --

15 T-A-G-G-A-R-T, out of the Fifth Circuit.

16 THE COURT: Counsel, are all these in --

17 MR. KORESKO: They're all in my brief.

18 THE COURT: Thank you.

19 MR. KORESKO: The prevailing authority is that the  
20 Department of Labor has the burden of showing a plan. The  
21 Department of Labor has certainly showed a trust but they

have

22 not showed a plan.

23 THE COURT: Let me just hear your response to that,  
24 please.

25 MS. HENRY: Yes. We believe that we have  
established

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Colloquy

1 through the testimony of Investigator Sweeting that in fact  
2 there were plan documents and that employers adopted those  
3 plan documents. And you know our legal arguments in support  
4 of why it's a plan. From our pleadings, the Court, I

believe,

5 would know that.

6 We do have copies of plan documents if that would  
7 assist, which we would introduce as having been produced  
8 through a subpoena to PennMont, through the investigator.

9 MR. KORESKO: It's a little late for that, Your  
10 Honor. And Ms. Sweeting -- they haven't established at all

on

7-17-09 Hearing

11 the basis of Ms. Sweeting's declaration --

12 THE COURT: Let's --

13 MR. KORESKO: -- what it is that they need to --

14 THE COURT: Let's set that issue aside momentarily.

15 MR. KORESKO: Okay.

adduced 16 THE COURT: Counsel, based upon the testimony

17 at this hearing, if the Court did not grant the temporary  
18 restraining order request, yet continued the matter for a  
19 preliminary injunction hearing prior to the expiration of the

20 ninetieth day, to which we've been deferring, how would  
21 citizens be harmed?

22 MS. HENRY: Well, Your Honor, as you know, the  
23 Department of Labor's position is that there is harm as a  
24 result of a violation of the statute --

25 THE COURT: But if at this juncture, based upon

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Colloquy

1 what's been adduced, all that's happened is that Mr. Koresko  
2 has requested funds, those requests have been denied.

3 MS. HENRY: Yes.

4 THE COURT: That's it.

5 MS. HENRY: Yes, but if in fact there was no attempt

6 from the Koresko defendants to seek the immediate turnover  
7 that they've requested, although it has been denied, through  
8 over venues, perhaps such as state court or some other venue,

9 the state would seek to --

have 10 THE COURT: And you wouldn't immediately seek to

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11 it removed?

12 MS. HENRY: We would seek to have it removed, yes,

13 Your Honor, but --

14 THE COURT: But --

15 MS. HENRY: -- by coming before this Court, we are

16 obviously trying to --

17 THE COURT: I guess my concern is simply that I've

18 not really heard anything up to this point in time that

would,

19 on the record, demonstrate irreparable immediate harm to,

20 quote/unquote, "the citizens" on whose behalf you bring this

21 action, to justify a temporary restraining order. That is

not

22 to say that after a full hearing, preliminary injunction

23 hearing, which would occur prior to the expiration of the

24 ninetieth day, that the Court's decision might differ.

25 Now, I also want to make a comment in that regard

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Colloquy

1 that while I ask Mr. Nicholas about authority, given that he

2 has, according to the record, given the direction, or

3 directives, regarding the nonexpenditure of these monies

4 requested by Mr. Koresko, that ultimately it is not his

5 decision. But then again, the Court has not heard from

6 anybody in terms of whose decision it might be. That burden

7 is on the government, is it not?

8 MS. HENRY: Your Honor, the burden to show

9 irreparable harm is indeed on the government, but the -- we

do

10 not know what F&M Trust will do in response to these

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11 directions.

12 THE COURT: And I can't speculate as to what they  
13 will do.

14 MS. HENRY: They've received the directions and they  
15 may in the future decide to comply with them, and it is the  
16 defendants who are getting the directions that violate ERISA  
17 and who are seeking to have the assets turned over to  
18 themselves in violation of Section 406 of the Act.

an

19 THE COURT: If the evidence in this record is that  
20 agreement exists and by that agreement Mr. Koresko, and I say  
21 him just because simplicity's sake, if Mr. Koresko said look,  
22 in this agreement we have the right, the absolute right, to  
23 terminate it, that's not a violation of ERISA because that's  
24 the agreement.

25 MS. HENRY: Two points, Your Honor. One is that an

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Colloquy

trust

1 agreement cannot, by the statute itself, an agreement, a  
2 agreement, a plan document, may not violate Sections 404 of  
3 ERISA.

4 THE COURT: Well, let me ask you directly, does the  
5 right to terminate violate the ERISA statute?

itself,

6 MS. HENRY: The right to terminate, in and of

--

7 does not violate ERISA, no. It would be issuing a decision  
8 or, excuse me, a directive on the right to terminate on the  
9 basis that the defendants were being asked to comply with

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10 ERISA and, importantly here, that they've asked to transfer  
11 the trust assets to an entity controlled by themselves. It  
is  
12 the entirety of those directions that the Department brings  
13 before the Court as violating ERISA and causing immediate  
harm  
14 should that trust asset be transferred to the defendants.

15 THE COURT: Has F&M responded in writing to the  
16 demand to turn over the trust?

17 MS. HENRY: Other than -- no, not to the -- as far  
as  
18 I know, not to the demand to turn over the trust. If  
19 Mr. Nieman has a different --

20 MR. NIEMAN: Your Honor, I don't believe that there  
21 has been a response to that, but our position has been that  
we  
22 will not turn it over. And shortly after that happened, this  
23 proceeding was initiated and here we are today.

24 THE COURT: Seems to me that if anyone -- if I deny  
25 this, that the only entity that would come running to court

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1 would be Mr. Koresko asking to force them to turn it over --

2 MS. HENRY: And perhaps --

3 THE COURT: -- which he can't do in this hearing.

4 MS. HENRY: This is true, Your Honor, and that is an  
5 option that the Department of Labor was seeking to eliminate.

6 THE COURT: I understand that, but how --

7 MS. HENRY: In that --



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8 THE COURT: -- could this Court do that?

9 MS. HENRY: Well, the harm to the public is that  
10 there would be continuing violations of ERISA. And should  
11 these trust assets be turned over to defendants, who the --

12 THE COURT: Well, ultimately -- let me ask it this  
13 way. I understand the complaint, but the allegation is  
14 continuing violation of ERISA; that's yet to be proved.

15 MS. HENRY: We believe that we had proved that  
16 through the requests for payment to Koresko Law Firm, which,  
17 in and of itself, violates Section 406(b)(1) of ERISA. They  
18 are a party-in -- they are fiduciary, excuse me. And a  
19 fiduciary may not deal with plan assets on their on behalf.

20 THE COURT: If --

21 MS. HENRY: That request --

22 THE COURT: If hypothetically -- this is not to  
23 denigrate you in any way, Mr. Koresko -- Mr. Koresko  
24 innocently was mistaken in the law or reasonably believed his  
25 interpretation was correct, and other entities similarly

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1 situated around the country did the same thing he did, would  
2 DOL go to court seeking injunctions across the board against  
3 every entity that made that innocent mistake or reasonable  
4 conclusion, particularly as an attorney if an attorney makes  
5 that decision?

6 MS. HENRY: Obviously, the department needs to  
7 evaluate each case as it comes before it. In this instance,  
8 Your Honor, a fiduciary is held to the standard of what

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that 9 someone who has expertise in the field would know. They  
10 cannot have, as it is said in one case, an empty head and a  
11 pure heart. So even an innocent mistake, if it does not  
12 comport with the fiduciary standards, would still violate  
13 section.

14 THE COURT: All right.

15 MR. KORESKO: May I respond, Your Honor?

have 16 THE COURT: In a second. I don't mind telling you  
17 what I'm thinking at this point in time. I think I may I  
18 already done that already, I suppose.

parcel 19 But first and foremost, I'm not inclined to grant  
20 this request for temporary restraining order. Part and  
truly 21 of why I'm not so inclined, however, is the fact that I  
22 believe, based on the evidence introduced at this hearing,  
23 that any requests by Mr. Koresko are going to be turned down.  
24 And as long as there is time remaining in this, quote,  
25 unquote, "ninety-day window", the Court could schedule a

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that's 1 preliminary injunction hearing, allow for any discovery  
2 absolutely necessary -- not of harassment nature, because the  
3 filings here are already voluminous -- and to hold that  
4 hearing, perhaps on the expiration of the ninetieth day, to  
5 give everyone a full opportunity to present the evidence to  
think 6 the Court for the Court to make a decision. And I don't

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7 that anyone's going to be prejudiced or harmed irreparably,  
8 given the testimony that nothing's going to be turned over.

9 And if in fact Mr. Koresko chooses, as he certainly  
10 has a right to do, to file an action to demand or enforce it,  
11 again, I would only assume that there's going to be an  
12 immediate request to remove. Now, I don't have any control  
13 over that, obviously.

14 But again, I don't think that the Court's decision  
15 here on the TRO request can be based upon this somewhat  
16 endless speculation that's outside of the record in this  
case.

17 And while I certainly understand the Department of Labor's  
18 position here, I don't think I've had sufficient evidence to  
19 this point that would demonstrate the justification for such  
20 an extraordinary ruling as a temporary restraining order.

21 MS. HENRY: With the understanding, Your Honor,  
22 there's a representation from counsel for F&M that in fact  
23 requests for payment that are in violation of ERISA, as  
you've  
24 heard described here, are not honored, and trust assets are  
25 not turned over to an entity that is controlled by  
defendants,

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1 we understand the Court's position. I don't -- Mr. Nieman is  
2 standing; I don't know if he wants to address the Court.

3 THE COURT: I'll hear from Mr. Nieman.

4 MR. NIEMAN: Your Honor, I mean, we are kind of  
stuck  
5 in the middle of this whole thing, as you obviously can see.

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6 And one of the concerns that we have going forward from here

7 - and you're free, obviously, to make a decision and I

8 understand where you're coming from -- how do we operate

9 forward, because we are stuck between a rock and a hard

10 Obviously, the Department of Labor has made

11 allegations against F&M in its complaint. Mr. Koresko and

12 entities have made allegations against us here. We do need

13 certain documentations and things like that to be able to do

14 our job. We need deposits to be made into the account, which

15 we've been allowing PennMont to do so that we can continue to

16 make the payments for insurance premiums and things like

17 And there's another issue --

18 THE COURT: And let me just -- as you're saying

19 I wanted to also make that a part of this record, that there

20 is nothing in the record adduced thus far -- and certainly

21 we've closed the record -- that would indicate that any

22 has been harmed for lack of payments to be made. Is that

23 correct?

24 MR. NIEMAN: I think that's correct for this point

25 time. I think the record's still open.

going

place.

his

that.

that,

entity

in

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1 THE COURT: I'm not talking about your entity, Mr.

2 Koresko.

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3 MR. NIEMAN: Mr. Koresko --

4 MR. KORESKO: No, I'm not talking about my entity  
5 either. Ms. Bonnie -- I would proffer Ms. Bonnie's testimony  
6 that in fact there are a dozen policies that are in danger of  
7 lapse right now because of the blanket -- the blanket order  
8 not to pay anything that is requested by PennMont in  
9 connection with --

10 THE COURT: Well again, you have a right to pursue  
11 that as the movant.

12 MR. KORESKO: Yes, that's --

13 THE COURT: That's not -- I have no control over  
that  
14 here.

15 MR. KORESKO: I understand that, Your Honor. I  
mean,  
16 you do and you don't. And I would suggest to you the  
17 following. As a chancellor in equity related to an ERISA  
18 trust, Your Honor has full authority under the All Writs Act  
19 to make any and all order which is equitable under the  
20 circumstances concerning --

21 THE COURT: If I did that it would be of more harm  
to  
22 you than anybody else. Are you sure you want me to do that?

23 MR. KORESKO: The notion ultimately -- you could --  
24 you could possibly -- you could order against me. What I'm  
25 saying to Your Honor is that we have 120 cases that are

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1 docketed for tax court. The trial is supposed to happen in

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not

It

the

2       October. The tax court of the United States is not going to  
3       stop while people fight over whether or not the trial can get  
4       paid for. The United States has a pecuniary interest in  
5       making sure that those participants are harmed to the extent  
6       of the tax liability related to the trust corpus which has  
7       been distributed. We pointed that out in our brief. But the  
8       United States is not here purely as a disinterested party.  
9       is here as a litigant. It has a pecuniary interest in the  
10      outcome. To interfere with the ability of the tax payers to  
11      defend and not have to pay tax, is absolutely essential to  
12      government's ability to force those tax fees to go away. In  
13      other words --

14               THE COURT: I don't know what the other words are,  
15      but I have absolutely no jurisdiction over that whatsoever.

16               MR. KORESKO: Well, Your Honor has -- well, I would  
17      ask Your Honor to consider the following as part of the  
18      overall order, the applicable order in this case. The  
19      insurance companies that are registered in Pennsylvania are  
20      all subject to the jurisdiction of this Court by operation of  
21      statute. And also, Your Honor has jurisdiction over them if  
22      in fact you accept, for purposes of this hearing only, that  
23      there may be an ERISA case.

24               To that extent, Your Honor can issue an order  
25      preventing any insurance company from lapsing any policies

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1 that are in the trust right now because they can't be paid  
2 for. Your Honor can do that because the beneficiaries, the  
3 sesquaeca (ph.) trust, as it's called, are the direct  
4 beneficiaries to whom both F&M and the Department of Labor  
5 have responsibilities to.

6 The Department of Labor cannot come in here and then  
7 ask Your Honor to do X with the expectation that the persons  
8 they're supposed to help are in fact going to get harmed. It  
9 just flies in the face of all equity. Equity follows the law  
10 in this circumstance.

11 The second thing that I would ask this Court to  
12 is that -- accepting as we will your decision to postpone an  
13 injunction ruling until sometime within this ninety-day  
14 period -- that F&M be ordered to do no harm. That is  
15 certainly within the realm of equity, and they are here.

It's

16 not that there's no due process and they don't know.

17 THE COURT: What does "do no harm" mean, give you  
18 what you're asking for?

19 MR. KORESKO: It means they pay the premiums when  
20 asked. They don't have -- if you're going to interfere with  
21 the trust -- if you're going to interfere with professional  
22 fees, that's certainly one thing. But if you're going to  
23 interfere with the actual execution of the documents that  
24 they're called to execute --

25 THE COURT: But counsel, that certainly is within  
the

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testified, 1 discretion of -- I would assume -- the attorney who  
2 Mr. Nicholas.  
3 MR. KORESKO: Okay.  
4 THE COURT: That's his call.  
5 MR. KORESKO: Well, I understand that --  
6 THE COURT: Because, again, of the fiduciary  
7 relationship and also the potential liability. I think they  
8 know what they're doing.  
9 MR. KORESKO: Yes, I do, and I know what you're  
10 saying. But of course -- let's look at the irreparable harm  
11 of uninsurable beneficiaries. If the policies --  
12 THE COURT: Well, now wait a minute. Irreparable  
13 harm -- they're the movants.  
they're 14 MR. KORESKO: Well, we're going to balance --  
15 the movants.  
16 THE COURT: But you're trying to switch to the point  
17 where you're claiming irreparable harm when you're not even  
18 the movant on this temporary restraining order request.  
19 MR. KORESKO: Your Honor, the standard is not the  
20 reasonable standard. This is a mandatory injunction  
21 proceeding. This is not a status quo injunction. In a  
22 mandatory injunction proceeding, the movant's burden is to  
23 show probability of success on the merits. I don't know if  
24 that's been shown today; I don't think it has. But more  
order 25 importantly, Your Honor, is in fashioning an appropriate



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1 for appropriate equitable relief under ERISA, pursuant to  
2 Great West v. Knudson and Varity v. Howe, et al., that Your  
3 Honor has the authority and Your Honor has to know in making  
4 and fashioning an order, that in fact beneficiaries aren't  
5 going to be harmed because third parties allegedly  
6 representing the beneficiaries' interests do the wrong thing.

7 The Department of Labor has taken the position that they're  
8 not to pay anything. The Department of Labor thus is going  
to  
9 cause beneficiaries who are uninsurable --

10 THE COURT: Counsel, I respectfully disagree with  
11 you. The Department of Labor has no control whatsoever over  
12 what Mr. Nicholas directs his counsel --

13 MR. KORESKO: Well, if they act --

14 THE COURT: -- then to do.

15 MR. KORESKO: If they act contrary to the directions  
16 of DOL.

17 THE COURT: That's his prerogative too, I suppose,  
18 his insurance.

19 MR. KORESKO: Well, is it reasonable to assume that  
20 the United States government -- that a trust --

21 THE COURT: I'm not going there. I will not let  
this  
22 hearing go there, counsel.

23 MR. KORESKO: All right, sir. I would just ask Your  
24 Honor to consider the fact that they can't meet their burden  
but  
25 of proving not only a probability of success on the merit,

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1 they can't prove balancing of the equities that lays in favor  
2 of the government's position here.

3 THE COURT: Again, I began my allowed opining with  
4 this is what I was inclined to do, which was simply to deny  
5 the request for a temporary restraining order without more.

6 MR. KORESKO: I accept that, Your Honor.

7 THE COURT: All right then, and that is the order of

8 the Court. Now, to the extent that there will be a  
9 preliminary injunction hearing where you'll have a full  
10 opportunity to present what you need to present -- once we  
11 look at our calendar and once I get, frankly, a stipulation  
12 here right now in terms of the equity of this Court as to

what

13 day the expiration will occur -- I will fashion a date  
14 consistent with your calendars to hold a hearing inside of  
15 ninety-day period. And I think if I do it that way,  
16 everyone's interests will be protected.

the

17 MR. NIEMAN: Your Honor, if I may, just voice a  
18 concern --

19 THE COURT: Yes, sir.

20 MR. NIEMAN: -- on behalf of F&M. I understand

where

21 you're coming from, for the next sixty or ninety days,  
22 whatever it is, we do need certain documents and certain  
23 information so that we can perform our duties. For example,  
24 we've requested a list of --

25 THE COURT: Well, no, that's something that I have

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1 absolutely no control over. That's between you and  
2 Mr. Koresko. And I've certainly heard testimony about what's  
think 3 forthcoming and what's not been forthcoming, but I don't  
4 that the Court, under the circumstances, is in a position to  
5 order anything, because quite honestly, I don't know enough.  
6 I don't have enough information about that. You do. It's as  
7 simple as that.  
8 MR. NIEMAN: Okay, Your Honor. Again, I appreciate  
9 that, it's just we do find ourselves in a very --  
10 THE COURT: You might want to go out in the hallway  
it. 11 and talk about it, but there's nothing that I can do about  
12 MR. NIEMAN: We may need to do that, Your Honor,  
job 13 because it's almost impossible for us to adequately do our  
14 with both the requirements of the DOL --  
15 THE COURT: I will say this. It certainly seems to  
16 me that when we look at the beneficiaries of the policy, that  
17 the actions of everyone involved can at least identify those  
financial 18 areas that will not hurt those people and hurt their  
19 interests. I think we've seen enough of that happen in this  
20 country to date. And as counsel, it seems to me you can  
21 identify the legitimate issues that are brought to the Court,  
22 and I will address those. But to the extent that there are  
23 other issues that really, really are affected by this, it's  
anything 24 more personality, to speak quite honestly, than it is

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25 else. And I urge you as strongly as I can, work those things

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within 1 out. Try to settle those things, even if it's for just  
2 the next ninety-day period of time, so that the people who  
3 have these investments are not hurt. I urge you to do that.  
4 MR. NIEMAN: Thank you.  
5 THE COURT: Thank you. This matter is adjourned for  
6 the day. Thank you.  
when 7 Counsel, I do want an agreement in writing as to  
8 the ninety-day period expires. Thank you.  
9 MS. HENRY: Thank you, Your Honor.  
but 10 THE COURT: I'm like a court forcing an agreement  
11 I want it.  
12 MR. NIEMAN: Thank you very much.  
13 MR. KORESKO: Your Honor, one thing.  
14 THE COURT: Yes, sir?  
preliminary 15 MR. KORESKO: When is our response to the  
16 injunction motion due?  
17 THE COURT: Now.  
18 MR. KORESKO: Can we have thirty days?  
19 THE COURT: No. No. That should've already been  
20 filed.  
21 MR. KORESKO: The preliminary injunction response?  
next 22 THE COURT: Yes. Can you not do that within the  
23 few days?

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24 MR. KORESKO: Okay.

25 THE COURT: You have -- ninety-nine percent of it is

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1 here anyway.

2 MR. KORESKO: Yes, Your Honor, I'm aware of that.

3 Thank you so much.

4 (Court is adjourned)

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